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United States 1076
Circuit Court of Appeals

For the Ninth Circuit.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, COATSFORD-
NEY LOGGING COMPANY, and SAGINAW TIMBER COMPANY,
Appellants,

vs.

DETROIT TRUST COMPANY and ALEXANDER McPHERSON, as
Trustees, and S. E. SLADE LUMBER COMPANY, WILLIAM T.
CAMERON, CAMERON-HOOVER LOGGING COMPANY, HUM-
TULIPS LOGGING COMPANY, FIRST FEDERAL TRUST COM-
PANY, and MILTON R. CLARK, Trustees, SLADE-WELLS LOG-
GING COMPANY,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the
Western District of Washington, Southern Division.

Filed

JAN 19 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE FIRST NATIONAL BANK OF SAN FRANCISCO, COATSFORD-
NEY LOGGING COMPANY, and SAGINAW TIMBER COMPANY,
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GING COMPANY,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Counsel.

JOHN C. HOGAN, Esquire, Aberdeen, Washington; and

E. C. HUGHES, Esquire, Colman Building, Seattle, Washington;

MAURICE McMICKEN, Esquire, Colman Building, Seattle, Washington;

W. T. DOVELL, Esquire, Colman Building, Seattle, Washington;

H. J. RAMSEY, Esquire, Colman Building, Seattle, Washington, and

Solicitors for the Appellants.

ZERA SNOW, Esquire, Northwestern Bank Building, Portland, Oregon;

WALLACE McCAMANT, Esquire, Northwestern Bank Bldg., Portland, Oregon;

EARL C. BRONAUGH, Esquire, Northwestern Bank Bldg., Portland, Oregon.

J. B. BRIDGES, Esquire, Aberdeen, Washington; and

THEODORE B. BRUENER, Esquire, Aberdeen, Washington,

Solicitors for the Appellees. [1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

No. 67—IN EQUITY.

DETROIT TRUST COMPANY and ALEXAN-
DER McPHERSON, as Trustees,
Plaintiffs,

vs.

S. E. SLADE LUMBER COMPANY, et al.,
Defendants.

THE FIRST NATIONAL BANK OF SAN FRAN-
CISCO, COATS-FORDNEY LOGGING
COMPANY, and SAGINAW TIMBER
COMPANY,

Intervenors.

Stipulation as to Transcript of Record.

It is hereby stipulated by and between the appel-
lants and respondents herein that the following or-
ders, pleadings, papers and matters appearing of
record herein shall be incorporated into and consti-
tute the transcript on appeal in this cause, the par-
ties hereby waiving the filing by either party of a
praecipe therefor, but reserving to both appellants
and appellees the right to file a praecipe for a tran-
script of any additional matters appearing of record
that may be deemed by either of them to be mate-
rial for the purposes of determining said appeal, to
wit:

(The clerk, in lieu of a written transcript, may
forward a printed or other true copy of any of the

items hereinafter described as a part of the transcript.) [2]

1.

Copy of the Bill of Complaint in Foreclosure of the Detroit Trust Company and Alexander McPherson, trustees, in said equity cause No. 67.

2.

Petition of said plaintiffs for the appointment of a receiver of the mortgaged premises.

3.

Order of the Court entered in said cause August 4, 1916, appointing George L. McPherson as such receiver.

4.

Petition of said receiver for an order authorizing the making of a contract for the logging of the timber upon said mortgaged premises.

5.

Order entered upon said petition August 4, 1916, authorizing the receiver to enter into said contract.

6.

Petition of the First National Bank of San Francisco et al., asking the vacation of said orders and cancellation of said contract, filed herein August 14, 1916.

7.

The original opinion of the Court made and filed at the first hearing.

8.

Order of the Court granting a rehearing and permitting the said First National Bank et al., the appellants herein, leave to file an amended petition as

4 *First Nat. Bank of San Francisco et al.*

intervening defendants in said cause. [3]

9.

The amended petition of the First National Bank et al., appellants herein.

10.

The answer of the American National Bank of San Francisco et al.

11.

The order of the Court on said original and amended petitions of the First National Bank et al., appellants herein, made and entered in this cause on the 18th day of December, 1916.

12.

The journal entry of the Court regarding notice of appeal given in open court by the said appellants, the filing of their assignments of errors and fixing a cost bond, made and entered in said cause on the 18th of December, 1916.

13.

The assignments of errors made and filed in said cause by the appellants at the time of taking said appeal on the said 18th day of December, 1916.

14.

The bond for cost on said appeal filed in said cause on the 18th day of December, 1916.

15.

The agreed statement of the case.

SNOW, McCAMANT & BRONAUGH,
EARL C. BRONAUGH,
BRIDGES & BRUENER,

Attorneys for Appellees.

HUGHES, McMICKEN, DOVELL & RAM-
SEY and
E. C. HUGHES,
JOHN C. HOGAN,

Attorneys for Appellants. [4]

IN THE

DISTRICT COURT OF THE UNITED STATES.

FOR THE WESTERN DISTRICT OF WASHINGTON—
SOUTHERN DIVISION.

IN EQUITY—No. 67.

DETROIT TRUST COMPANY and ALEXAN-
DER McPHERSON, as Trustees,
Plaintiffs,

against

S. E. SLADE LUMBER COMPANY, WILLIAM
T. CAMERON, CAMERON-HOOVER
LOGGING COMPANY, HUMPTULIPS
LOGGING COMPANY, FIRST FEDERAL
TRUST COMPANY and MILTON R.
CLARK TRUSTEES, SLADE-WELLS
LOGGING COMPANY,

Defendants.

Bill of Complaint for Foreclosure.

SIDNEY T. MILLER,
2148 Penobscot Building,
Detroit, Michigan.

WALLACE McCAMANT,
Northwestern Bank Building,
Portland, Oregon,

Solicitors and of Counsel for Plaintiff.

MILLER, SMITH, CANFIELD, PADDOCK & PERRY,
2148 Penobscot Building,
Detroit, Michigan.

SNOW, McCAMANT & BRONAUGH,
Northwestern Bank Building,
Portland, Oregon,
Solicitors for Plaintiff. [5]

*In the District Court of the United States for the
Western District of Washington, Southern Divi-
sion.*

IN EQUITY—No. 67.

DETROIT TRUST COMPANY and ALEXAN-
DER McPHERSON, as Trustees,
Plaintiffs,
against

S. E. SLADE LUMBER COMPANY, WILLIAM
T. CAMERON, CAMERON-HOOVER
LOGGING COMPANY, HUMPTULIPS
LOGGING COMPANY, FIRST FEDERAL
TRUST COMPANY and MILTON R.
CLARK TRUSTEES, SLADE-WELLS
LOGGING COMPANY,

Defendants.

To the Honorable Judges of the District Court of the United States in and for the Western District of Washington, Southern Division:

Detroit Trust Company and Alexander McPherson, as Trustees, bring this their Bill of Complaint against S. E. Slade Lumber Company, William T. Cameron, Cameron-Hoover Logging Company, Humptulips Logging Company, First Federal Trust Company and Milton R. Clark, Trustees, and Slade-Wells Logging Company, and thereupon the plaintiffs complain and allege: [6]

First. The plaintiff, Detroit Trust Company, at all the times hereinafter mentioned was, and still is, a corporation organized and existing under the laws of the State of Michigan, and of no other State, having its office and principal place of business in the city of Detroit, Wayne County, Michigan, and is a citizen of the State of Michigan, and a resident of the city of Detroit in the county of Wayne and State of Michigan, and a resident of the Eastern District of Michigan. That at all the times hereinafter mentioned said plaintiff, Detroit Trust Company was, and now is, duly authorized and empowered under and by virtue of the laws of the State of Michigan and of Washington, and by its charter, to take and hold in trust the property transferred and conveyed to it upon the trusts hereinafter stated, and to execute and perform the trusts upon it imposed, under and by virtue of the terms and provisions of the mortgage hereinafter mentioned.

Second. At all the times hereinafter mentioned plaintiff, Alexander McPherson, was, and still is, a

citizen of the State of Michigan, and a resident of the city of Detroit in the county of Wayne in said State of Michigan, and a resident of the Eastern District of Michigan.

Third. At all the times hereinafter mentioned the defendant, S. E. Slade Lumber Company (hereinafter sometimes called "Lumber Company") was, and still is, a corporation organized and existing under the laws of the State of California, and of no other State, having its office and principal place of business in the city and county of San Francisco, State of California, and is a citizen of the State of California, and a resident of the city and county of San Francisco, State of California, and a resident of the Northern District of California. Said defendant, Lumber Company, at all the times hereinafter mentioned was, and still is, authorized by the laws of said States of California and of Washington, and by its charter, from time to time to borrow money for its lawful corporate purposes, to issue [7] and dispose of its bonds for any amount so borrowed, and to mortgage its corporate property and franchises to secure the payment of any debt contracted for said purposes.

Fourth. That the defendant, William T. Cameron, is a citizen of the State of Washington and a resident of the city of Aberdeen in the county of Grays Harbor in said State of Washington and a resident of the Western District of Washington.

Fifth. That the defendant, Cameron-Hoover Logging Company, is a corporation organized and existing under the laws of the State of Washington,

and of no other State, having its office and principal place of business in the city of Aberdeen, Grays Harbor County, State of Washington, and is a citizen of the State of Washington, and a resident of the city of Aberdeen in the County of Grays Harbor, State of Washington, and a resident of the Western District of Washington.

Sixth. That the defendant, Humptulips Logging Company, is a corporation organized and existing under the laws of the State of Washington, and of no other State, having its office and principal place of business in the city of Aberdeen, Grays Harbor County, State of Washington, and is a citizen of the State of Washington and a resident of the city of Aberdeen in the county of Grays Harbor, State of Washington, and a resident of the Western District of Washington.

Seventh. That each of the defendants, First Federal Trust Company, joined as Trustee with Milton R. Clark and Slade-Wells Logging Company, is a corporation organized and existing under the laws of the State of California, having its office and principal place of business in the city and county of San Francisco, State of California, and is a citizen of the State of California, and a resident of the city and county of San Francisco, State of California, and a resident of the Northern District of California.
[8]

Eighth. That the defendant, Milton R. Clark, joined as Trustee with the First Federal Trust Company, is a citizen of the State of California and a resident of the city and County of San Francisco,

State of California, and a resident of the Northern District of California.

Ninth. That this is a suit in equity of a local nature and that the lands, premises and property involved therein lie wholly within the Southern Division of the Western District of Washington. That this suit is between citizens of different states. That the amount in controversy herein exceeds the sum of three thousand dollars (\$3,000), exclusive of interest and costs.

Tenth. Heretofore and on September 1st, 1910, the defendant, S. E. Slade Lumber Company, in the due exercise of the powers and authority by it in that behalf possessed, due corporate action having first been had for the purpose of borrowing money for the uses of said defendant Lumber Company, duly authorized the issue of its "First Mortgage Gold Bonds" (hereinafter called the "bonds") to the aggregate principal amount of one million dollars (\$1,000,000), bearing interest at the rate of six per cent (6%) per annum and duly resolved to secure the payment thereof by a first mortgage.

Eleventh. In pursuance of such resolution, and in the exercise of the lawful powers of such defendant Lumber Company, the officers of said Lumber Company, in its name and as its lawful corporate act pursuant to due and sufficient authority and approval as aforesaid, made and executed said bonds of the Lumber Company amounting in the aggregate to one million dollars (\$1,000,000) face value of principal, by which bonds said Lumber Company promised to pay on March 1st, 1911, and semi-

annually thereafter to and including September 1st, 1920, to the bearers thereof or if registered, to the registered holders thereof, fifty thousand dollars (\$50,000) par value of the principal represented by said bonds respectively in gold coin of the United States [9] of or equal to the present standard of weight and fineness at the office of Detroit Trust Company, Detroit, Michigan, and to pay interest on said bonds from the date thereof until paid, at the rate of six per cent (6%) per annum in like gold coin, on the first days of March and September in each and every year until the principal of said bonds respectively became due.

Twelfth. Under date of September 1st, 1910, the defendant Lumber Company, pursuant to the resolution and determination above set forth, due corporate action having first been had, in order to secure the principal and interest of said bonds when the same should become due and payable, and to secure the performance and observance of all the covenants, agreements and conditions on the part of said Lumber Company contained in the mortgage hereinafter mentioned and to declare the terms and conditions upon which said bonds were issued and for other good and valuable considerations, made, executed and delivered to the plaintiffs as trustees its certain mortgage or deed of trust (hereinafter called "mortgage") bearing date September first, 1910, wherein it granted, bargained, sold, transferred, assigned, mortgaged and conveyed, and warranted unto said plaintiffs as Trustees, and their successors in said trust, the following described real and personal

property in the county of Chehalis (now changed to Grays Harbor County), State of Washington:

All of the lands, water front, timber and other property hereinafter described, together with all the buildings, structures and improvements of every kind and character that are now, or may hereafter be placed upon said lands, and all the rights, ways, privileges, servitudes, appurtenances and prescriptions thereto belonging or in anywise appertaining, and especially including all lumber-mills and lumber-mill plants, sawmills, planing-mills, machine-shops, sheds, pump-houses, blacksmith-shops, barns, oil-houses, boilers, engines, pumps, machinery, sprinkler systems, fire apparatus, kilns, power-houses, tools, fixtures, furniture, appliances, shafting, conveyors, electric apparatus, office buildings, logging roads, tramways, railways and appurtenances, rolling stock, locomotives and cars, loaders, rails, ties, stations, platforms, lumber and logging camps and equipments, mill sites and lumber-yards, booms, dwelling-houses, wharves and planking, [10] patterns, boats, tanks, burners, horses, trucks and wagons, and the entire plants and equipments and all improvements or additions, now or that hereafter may be erected or located on any of said lands or premises, or which are or may hereafter be connected with, appertaining to, or used in connection with the same, now owned or hereafter acquired, and all substitutions, replacements or renewals or additions to said lands, premises and

property, or any part thereof, and all lands and other property which may be added thereto and brought under the terms hereof as hereinafter provided; and all the timber and other forest products on said lands and premises, or any of them, or that hereafter may be thereon; and all personal property whether enumerated hereinbefore or not, now owned, or which shall be hereafter acquired by the Lumber Company, which shall be situated upon the real property hereinafter described, or which shall be used in connection with any enterprise which shall be located thereon, excepting all logs, lumber, and kindred products paid for, in booms or on mill premises.

A particular description of said lands and premises is as follows:

All those certain pieces or parcels of land situated in the county of Chehalis, State of Washington, known and described as follows:

Lots one (1), two (2), three (3) and four (4) in Block "C"; Lots one (1), two (2), three (3) and four (4) in Block "D"; all of Blocks "F," "G" and "H"; Lot one (1) in Block fourteen (14); Lots one (1), two (2), three (3), four (4), five (5) and six (6), in Block fifteen (15); Lots one (1), two (2), three (3), four (4), five (5), six (6), ten (10), eleven (11) and twelve (12), in Block sixteen (16); Lots one (1) to twelve (12), both inclusive, in Block seventeen (17); Lots three (3), four (4), five (5), six (6), nine (9) and ten (10), in Block eighteen

(18); Lot twelve (12) in Block twenty-five (25); Lots eight (8), nine (9), ten (10), eleven (11) and twelve (12), in Block twenty-six (26); Chehalis Street South of the south line extended of the alley in Block fifteen (15); Newell Street South of the south line extended of the alley in Blocks fifteen (15) and Sixteen (16); Harbor Street south of Grant (now Heron) Street; Kansas Street south of the south line extended of the alley in Block seventeen (17); Kansas Street between Lot four (4) in Block "D" and Lot twelve (12) in Block twenty-five (25); the alley in Block "D"; Summit Street west of the east line of Lot twelve (12), Block twenty-five (25) extended north to Lot one (1) in Block "C"; Harbor Street north of the north line extended of the alley in Block twenty-six (26); the unnamed street lying between Blocks fifteen (15), sixteen (16) and seventeen (17) on the north, and Blocks "G" and "H" on the south; all in Samuel [11] Benn's original plat of the town (now city) of Aberdeen, County of Chehalis, State of Washington; said Plat being recorded in the office of the Auditor of said County of Chehalis, in Book one (1) of Plats, page thirty-nine (39).

Lot one (1), Tract twenty-five (25), and all of Tract thirteen (13), Aberdeen Tide Lands; all the above in Lot two (2), Section nine (9), township seventeen (17), North of Range nine (9) west of the Willamette Meridian, in Chehalis County, State of Washington.

Also Lots one (1), two (2), three (3), four (4) and five (5) in Block "D"; and Lots one (1), two (2), three (3), four (4), five (5) and six (6) in Block "E," in South Aberdeen; Lewis Street north of the south line of Blocks "D" and "E," South Aberdeen; all in Johnston's Plat of South Aberdeen, recorded in the office of the Auditor of said County of Chehalis, in Book One (1) of Plats, page one hundred twenty-five (125); Lots two (2) and three (3), in Tract eleven (11), Aberdeen Tide Lands; all of the above in Lot eight (8), Section nine (9); and Lot six (6), Section ten (10), Township seventeen (17) north, Range nine (9) west, Willamette Meridian; also the south half of the southeast quarter (S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$) of Section eleven (11); the northeast quarter (N. E. $\frac{1}{4}$), and the south half (S. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$), and an undivided one-half interest in the southeast quarter (S. E. $\frac{1}{4}$) of Section fourteen (14); also the south half (S. $\frac{1}{2}$) of Section fifteen (15); the northeast quarter (N. E. $\frac{1}{4}$), the east half of the northwest quarter (E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$), and the south half (S. $\frac{1}{2}$) of Section twenty-one (21); all of Section twenty-two (22); the east half of the northeast quarter (E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$), and the northwest quarter (N. W. $\frac{1}{4}$) of Section twenty-three (23); all of Sections twenty-seven (27) and twenty-eight (28); the southeast quarter of the northwest quarter (S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$), the northeast quarter of the southwest quarter

(N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$), the south half of the southwest quarter (S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$), and the east half of Section thirty-two (32); all of Section thirty-three (33); the northeast quarter and the southwest quarter (N. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$) of Section thirty-four (34); all in Township twenty-one (21), North of Range nine (9) west, Willamette Meridian; also, the leasehold interest held under and by virtue of a lease from the State of Washington to said S. E. Slade Lumber Company, dated March 10, 1910, and recorded May 17, 1910, in the office of the Auditor of said County of Chehalis, in Book twenty-nine (29) of Miscellaneous Records, page five hundred fifty-two (552), in and to part of Harbor area in front of the following described property, viz: Lots two (2) and three (3), Tract eleven (11), and Tract thirteen (13), Aberdeen Tide and Shore Lands more particularly described as follows: All harbor [12] area lying in front of Lots two (2) and three (3), Tract eleven (11), Aberdeen Tide and Shore Lands, and bounded by the inner and outer harbor lines and the northeasterly line of Lot two (2), and the southwesterly line of Lot three (3) produced across the harbor reserve to the outer harbor line; also all harbor area lying in front of Tract thirteen (13), Aberdeen Tide and Shore Lands and bounded on the northwesterly side by the inner harbor line, and on the southeasterly side by the outer harbor line, and on the southwesterly side by a line drawn

from angle point number eleven (11) on the outer harbor line to angle point number eleven (11) on the inner harbor line, and on the east side by the east line of said Tract thirteen (13) produced across the harbor reserve to the outer harbor line, all as shown on official maps of Aberdeen Tide and Shore Lands on file in the office of the Commissioner of Public Lands at Olympia, Washington; all situate and being in the County of Chehalis, State of Washington; (excepting existing rights of way, property and appurtenances of Railroad and Railway Companies, also excepting all public roads and such mineral claims and rights of way for ditches and canals and other rights as are reserved by the United States in its patents to the respective lands.

Also all railroad rails and angle irons, and four (4) locomotives now belonging to "Lumber Company," and now situate and being in Township 18 North, of Range 6 West, Willamette Meridian, or adjacent thereto, said rails and angle irons now constituting a part of a railroad running into said Township 18 North, of Range 6 West, Willamette Meridian, from a junction point on the Northern Pacific Railroad, commonly known as "Mack's," and said locomotives being now operated on said railroad. It being the intention of said "Lumber Company" to cover in this instrument said rails, angle irons and locomotives, whether same are used upon or in connection with the lands in said

Township 18 North, of Range 6 West, Willamette Meridian, or upon or in connection with any other land or lands whether belonging to "Lumber Company" or otherwise, whether same are covered by the provisions of this mortgage or otherwise, so that said rails, angle irons and locomotives shall be at all times hereafter, wheresoever they are situated, covered by the terms of and subject to the lien created by this instrument. Provided, however, that it is expressly agreed between the "Trustee" and the "Lumber Company" that said "Lumber Company" may at any time prior to the removal of said rails, angle irons and locomotives to the real estate covered by this instrument, dispose of said rails, angle irons and locomotives, or any part or parcel thereof, as it may desire and at such price as it may deem satisfactory, and without first securing permission therefor from "Trustee," with the express understanding that said "Lumber Company" [13] shall pay over to "Trustee" the proceeds of any such sale or sales or disposals of said rails, angle irons or locomotives, or any part or parcel thereof, said proceeds to be placed in the sinking fund hereinafter provided for, or shall in default thereof furnish to the "Trustee" hereunder by appropriate instruments to be approved by said "Trustee,"

other property equal in value to the property sold as above provided for, to take the place of said prop-

erty so sold or disposed of, as security under the terms of this instrument.

All upon the trusts and for the uses, intents and purposes expressed in said mortgage made to the plaintiffs as trustees.

And a true copy of said mortgage to the plaintiffs as trustees is annexed to this bill of complaint and marked Exhibit "A," and the plaintiffs pray leave that the copy of said mortgage marked Exhibit "A" may be taken in all respects as if it were fully and specifically set forth in the body of this bill of complaint.

Thirteenth. Said mortgage Exhibit "A" was executed and delivered in all respects in conformity with law and the plaintiffs duly accepted the trusts created in and by said mortgage before the record of the same and said mortgage was thereafter, and on the 3d day of September, 1910, filed for record in the county auditor's office in the county of Chehalis, State of Washington and recorded in Book 43 of record of mortgages of Chehalis County (State of Washington, on page 430. And on said September 3d, 1910, and within ten (10) days of its execution, an original duplicate of said mortgage accompanied by the statutory affidavit of mortgagor, was filed in the office of the county auditor of said Chehalis County as a chattel mortgage.

Fourteenth. Thereafter all of the bonds secured by and issuable under said mortgage Exhibit "A," one million dollars (\$1,000,000) being the aggregate principal amount thereof, was duly executed and issued as aforesaid, and were duly authenticated by

the endorsement thereon of the certificate of Detroit Trust Company as trustee, as provided in and by [14] said Exhibit "A," and so authenticated were duly issued and delivered by said plaintiff, Detroit Trust Company, Trustee, pursuant to the provisions of said mortgage and according to law, and the plaintiffs are informed and believe, and therefore allege, that said bonds so authenticated and delivered have, and all of them have, been duly issued, negotiated, sold and delivered by the defendant lumber company to the person or persons who thereby became *bona fide* holders thereof as purchasers for value, and that all of said bonds so authenticated and delivered are now outstanding and valid, binding and subsisting obligations of the defendant lumber company, except bonds numbered 1 to 450, both numbers inclusive, for the principal sum of one thousand dollars (\$1,000) each, which said last-mentioned and described bonds have been paid.

Fifteenth. The defendant lumber company made default in the payment of the principal of the bonds due September 1st, 1915 (being bonds numbers 451 to 500, both numbers inclusive), and in the payment of the principal of the bonds due March 1st, 1916 (being bonds numbers 501 to 550, both numbers inclusive), issued and outstanding under and secured by said mortgage Exhibit "A" and such default still continues. Plaintiffs aver that demand was made for the payment of the whole of said principal in default as aforesaid in accordance with the terms of said mortgage Exhibit "A," and especially in accordance with the provisions of "Article XI"

thereof. Said demand was made on June 21st, 1916, by registered mail and was received by lumber company in its office in the city of San Francisco, California, on June 26th, 1916. That more than thirty (30) days has elapsed since the payment of the whole of said principal in default became due and was demanded as aforesaid, and said default still continues.

Sixteenth. In and by "Article XI" of said mortgage Exhibit "A," it is provided among other things, that in case default shall be made in the payment of any of the principal specified in any of the said bonds and any such default shall continue for a period [15] of thirty (30) days after the same becomes due is demanded, the Detroit Trust Company, Trustee, may declare the principal of all the bonds secured by said mortgage Exhibit "A" and then outstanding, to be, and the same shall thereupon become, immediately due and payable anything contained in said bonds or in said mortgage to the contrary notwithstanding. Default having been made by the defendant lumber company in the payment of the principal as aforesaid, and such default having continued for a period of more than thirty (30) days after the payment of said principal amount in default became due and was demanded, the plaintiffs as trustees and Detroit Trust Company, trustee, exercising the option conferred upon it in this regard by said "Article XI," did on July 27th, 1916, declare the principal of all the bonds secured by said mortgage Exhibit "A," and then outstanding, to be immediately due and payable. That

said declaration was made in writing, and an original duplicate thereof filed in the trust files of trustee pertaining to this matter and an original duplicate thereof served on lumber company at its office in the city of San Francisco, California. That since such principal was declared due and payable as aforesaid, no payment of principal or interest or expenses has been made by lumber company.

Seventeenth. That in and by said mortgage Exhibit "A" it is provided that after default by the lumber company, the plaintiffs, as trustees as aforesaid, shall be entitled to take and use the rents, tolls, incomes, issues, earnings and profits of the property and premises described therein. That in and by "Article XV" of said mortgage Exhibit "A," it is provided that upon the commencement by the plaintiffs as trustees of any suit to foreclose said mortgage, lumber company shall enter its appearance voluntarily and shall consent to the entry of an order for the appointment of a receiver of the lands and property covered thereby, and of the earnings, revenues, issues, profits and income thereof for the sole benefit of the holders of the bonds secured thereby. [16]

Eighteenth. That in "Article VI" of said mortgage Exhibit "A," it is expressly provided that if lumber company fail to take out and deliver to the plaintiffs, as trustees, the policies of insurance required thereby, Detroit Trust Company, as trustees, or the plaintiffs, as trustees, may procure such insurance for the benefit of the bondholders, and all sums expended therefor shall be secured by said mortgage,

and shall be payable forthwith by Lumber Company, with interest at the rate of seven per cent (7%) per annum, payable semi-annually.

Nineteenth. That in "Article X" of said mortgage Exhibit "A," it is expressly provided that if Lumber Company make default in the payment of any taxes, assessments, rates, charges or liens provided for in said mortgage, Detroit Trust Company as trustee, or the plaintiffs as trustees, may pay same and the sums so paid shall be secured by said mortgage, and shall be payable forthwith by Lumber Company with interest at the rate of seven per cent (7%) per annum payable semi-annually.

Twentieth. That in "Article XIV" of said mortgage, it is expressly provided that upon a sale being made under a decree of Court the proceeds of such sale, together with any sums then held by Detroit Trust Company as trustee, or by the plaintiff as trustees, shall be first applied to the costs and expenses of the foreclosure proceedings including the cost of procuring abstracts of title and tax statements or extensions thereof, attorneys' fees and trustees' compensations, which said amount shall be secured by said mortgage.

That in said "Article XIV" it is further provided that upon any foreclosure sale the purchaser, in making payments therefor, after making such cash payments as are necessary to cover the costs and expenses of the sale and of the proceedings incident thereto including the trustees' reasonable compensation and attorneys' fees and all other charges that may be decreed to be paid in cash, shall be entitled

to use and apply any outstanding bonds and any [17] matured and unpaid coupons in order that there may be credited thereon such sum as shall be payable thereon out of the net proceeds of the sale. Plaintiffs aver that \$15,000 is a reasonable attorneys' fee in this matter.

Twenty-First. That in "Article XVIII" of said mortgage, Lumber Company expressly assents to the appointment of a receiver as a matter of course in case resort is had to any court to foreclose same, and further consents to the entry of a deficiency judgment or decree in case the decree or judgment of foreclosure is not satisfied at the sale of the mortgaged property.

Twenty-Second. That of the bonds issued under and secured by said mortgage Exhibit "A" there have been paid and canceled those numbered from one (1) to four hundred and fifty (450), both numbers inclusive, aggregating four hundred and fifty thousand dollars (\$450,000) in principal amount. That all interest on the bonds issued under and secured by said mortgage Exhibit "A," and now outstanding, has been paid to March 1st, 1916. That there is now due and owing from the defendant Lumber Company to the plaintiffs as trustees and to the owners and holders of the bonds issued and outstanding under and secured by said mortgage Exhibit "A," the sum of five hundred and fifty thousand dollars (\$550,000) for the principal of said bonds, together with interest on said principal amount at the rate of six per cent (6%) per annum since March 1st, 1916.

Twenty-Third. That there now remains in the

sinking fund provided for by "Article VII" of said mortgage the sum of twenty-four thousand and six dollars and ninety-four cents (\$24,006.94) to the credit of said Lumber Company. That there was not in said sinking fund either on September 1st, 1915, or on March 1st, 1916, a sum of money sufficient to pay the principal of the bonds falling due on those dates respectively.

Twenty-Fourth. That on or about August 29, 1912, the plaintiffs as trustees acting in accordance with the provisions of said mortgage Exhibit "A," released from the lien of said instrument [18] so much of the logging equipment described therein as was on August 29th, 1912, located in Township 21 North of Range 9 West, Chehalis County (now Grays Harbor County), Washington.

That on about August 26th, 1914, the plaintiffs as trustees, acting in accordance with the provisions of said mortgage, Exhibit "A," released from the lien of said instrument so much of the logging equipment described therein as was on August 26th, 1914, located in Township 18, North of Range 6 West, Willamette Meridian, Chehalis County, Washington.

Twenty-Fifth. That the property and premises covered by said mortgage Exhibit "A" or the major portion thereof are now subject to the lien of a certain second mortgage made by S. E. Slade Lumber Company to Detroit Trust Company as of March 1st, 1915, securing a promissory note for sixty-nine thousand dollars (\$69,000). That said second mortgage was filed for record in the office

of the county auditor of Chehalis County, Washington, on March 1st, 1915, and was recorded in book 57 of Record of Mortgages, Chehalis County, on page 378. That an original duplicate of said mortgage, accompanied by the statutory affidavit of mortgagor, was filed in said county auditor's office on March 1st, 1915, within ten (10) days of its execution. That said Detroit Trust Company, second mortgagee as aforesaid is not made a party to this proceeding because it is not an indispensable or necessary party hereto and because it cannot be made a party hereto without ousting the jurisdiction of this Honorable Court. And further plaintiffs aver that said Detroit Trust Company, second mortgagee as aforesaid, has hitherto brought proceedings in this Honorable Court to foreclose its said second mortgage. And plaintiffs aver that there is no identity or unity of ownership whatsoever as to said respective mortgages.

Twenty-Sixth. That no proceedings have been had at law or otherwise and that no other action has been brought for the recovery of said sum secured by said bonds and mortgage or for the recovery of the said mortgage debt, or any part thereof.

Twenty-Seventh. That the plaintiffs further show upon information and belief that the defendants, William T. Cameron-Hoover Logging Company, [19] Humptulips Logging Company, First Federal Trust Company and Milton R. Clark, Trustees, and Slade-Wells Logging Company, have, or claim to have, some interest in or lien upon the said mortgaged premises or some part thereof; but plaintiffs aver

that the interest of each of said defendants, if any, is inferior, subject and subsequent to the lien of these plaintiffs, by virtue of said bonds and mortgage as above set forth.

WHEREFORE the plaintiffs pray:

(1) That said mortgage Exhibit "A" made by the defendant Lumber Company to the plaintiffs be foreclosed.

(2) That the lien of said mortgage Exhibit "A," may be decreed and established as a lien upon all and singular the premises and property of the defendant Lumber Company, real and personal, covered thereby or intended so to be prior to any and all other liens and claims whatsoever, and that a fair and just account may be had touching the amounts due and unpaid upon the bonds issued thereunder and secured thereby.

(3) That in default of the payment of the sums so found to be due within a time to be limited by a decree of this Honorable Court, together with such amounts as may be sufficient to pay all premiums of insurance and all taxes and assessments paid by the plaintiffs as trustees, and all expenses of having abstracts of title and tax histories certified to date, together with interest thereon, and together with such sums as may be allowed by this Honorable Court for the costs of this suit, including all allowances, expenses and compensation to the plaintiffs as trustees, and to pay compensation of plaintiffs' attorneys, counsel, solicitors, agents and representatives and all other expenses, advances and liabilities made or incurred by the plaintiffs as trustees, and compensation and allowances to any receiver

appointed herein, it may be decreed that the defendants, and all persons claiming from, through or under them any interest in or to said mortgaged property, or any [20] part thereof as aforesaid, subject to the lien of said mortgage Exhibit "A," may be absolutely and forever barred and foreclosed of and from all right, title and interest or equity of redemption of, in and to said mortgaged premises or property, or any part thereof, and that a sale of the whole of said mortgaged property and premises in one lot or parcel free and clear of all other liens and claims whatsoever, but subject to the privilege of redemption by the second mortgagee, be ordered in accordance with law and the practices of this Honorable Court, and that the proceeds may be applied in accordance with the provisions of said mortgage Exhibit "A."

(4) That said decree shall further provide that upon any foreclosure sale of the said property or premises, or of any part thereof, the purchaser in making payment therefor shall be entitled to use and apply any outstanding bonds and any matured and unpaid coupons secured by said mortgage exhibit "A," in accordance with and upon the terms and conditions prescribed in said mortgage.

(5) That a receiver be appointed by this Honorable Court with power to take and hold possession of the property and premises covered by the mortgage Exhibit "A," sought to be foreclosed herein, and of the earnings, revenues, issues, profits and income thereof, and with such other and further powers and authority in the premises as is usually possessed by a receiver in like cases, and as this

Court may decree.

(6) That the defendant Lumber Company and its, or any of its officers, directors, agents and employees, and all other persons claiming or pretending to claim under it, may be restrained by injunction of this Honorable Court from interfering with or disposing of said mortgaged premises and property and any part thereof, and any earnings or income therefrom or proceeds thereof. [21]

(7) That the defendants herein may answer all and singular the premises but not under oath (answer under oath being hereby expressly waived.)

(8) That the rights of Detroit Trust Company, second mortgagee, may be completely and adequately preserved by the decree of this Court.

(9) That the plaintiffs may have such other and such further relief in the premises as the nature and circumstances of the case require, and to your Honors may seem meet.

DETROIT TRUST COMPANY.

[Corp. Seal]

By RALPH STONE,

President.

(Seal)

Attest: CHAS. P. SPICER,

Secretary.

ALEXANDER McPHERSON,

As Trustees.

SNOW, McCAMANT and BRONAUGH,
Northwestern Bank Building, Portland, Oregon.

MILLER, SMITH, CANFIELD, PAD-
DOCK & PERRY,

2148 Penobscot Building, Detroit, Michigan.

Solicitors for Plaintiffs.

WALLACE McCAMANT,

Northwestern Bank Building, Portland,
Oregon.

SIDNEY T. MILLER,

2148 Penobscot Building, Detroit, Michi-
gan.

Solicitors and of Counsel for Plaintiffs.
[22]

United States of America,
Eastern District of Michigan,
County of Wayne,—ss.

Ralph Stone being duly sworn deposes and says that he is an officer, to wit, the president, of Detroit Trust Company, one of the above-named plaintiffs, as trustees, and that he has read the foregoing bill of complaint, knows the contents thereof and that the same is true.

RALPH STONE,

Subscribed and sworn to before me this 27th day
of July, 1916.

[Seal]

NORTON J. MILLER,

Notary Public, Wayne Co., Mich.

My commission expires Oct. 12, 1917. [23]

United States of America,
Eastern District of Michigan,
County of Wayne,—ss.

Alexander McPherson, being duly sworn deposes and says that he is one of the above named plaintiffs as trustees and that he has read the foregoing bill of complaint, knows the contents thereof and that the same is true.

ALEXANDER McPHERSON,

Subscribed and sworn to before me this 27th day of July, 1916.

[Seal]

NORTON J. MILLER,

Notary Public, Wayne Co., Mich.

My commission expires Oct. 12, 1917. [24]

**Exhibit "A" Attached to Bill of Complaint for
Foreclosure—Mortgage from S. E. Slade Lum-
ber Co. to Detroit Trust Co.**

THIS INDENTURE, Made this first day of September, A. D. 1910, Between S. E. Slade Lumber Company, a corporation duly organized and existing under and by virtue of the laws of the State of California (sometimes hereinafter for brevity called the "Lumber Company"), party of the first part, and Detroit Trust Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan sometimes hereinafter for brevity called the "Trustee"), and Alexander McPherson, both of Detroit, Wayne County, Michigan, as Trustees, parties of the second part, WITNESSETH:

WHEREAS, at a meeting of the board of directors of said S. E. Slade Lumber Company, duly called and held on the fifteen day of July, A. D. 1910, at No. 112 Market Street in the city of San Francisco, and State of California, the following preamble and resolutions were adopted by the unanimous vote of the entire board of directors then and there present to wit:

WHEREAS, this corporation, S. E. Slade Lumber Company, owns large tracts of timber lands in the State of Washington, with a stumpage aggre-

gating approximately six hundred and fifty-two million (652,000,000) feet, and also owns mills and mill sites and mill plants, waterfront, real estate, railroad tracks and right of way equipment, logging equipment and other structures and buildings on said property:

AND WHEREAS, this company is indebted to banks and others in a considerable amount; [25]

AND WHEREAS, there now exists no bonded indebtedness of this company and it is deemed advisable at this time to originally create a bonded indebtedness for the purpose of providing funds to pay the existing floating indebtedness of this company, and for the further proper conduct of its business;

“NOW, THEREFORE, BE IT RESOLVED, That a bonded indebtedness of S. E. Slade Lumber Company, to the amount of one million dollars (\$1,000,000), in United States gold coin, be and the same hereby is authorized and created for the purpose of providing moneys to pay the existing indebtedness of the corporation, and for all legitimate and necessary corporate purposes; and

“BE IT FURTHER RESOLVED, That the president and secretary of this company be, and they hereby are authorized to execute and issue, in the name of this company and under its corporate seal, first mortgage gold bonds of this company in the sum of one million dollars (\$1,000,000), to consist of one thousand (1,000) bonds, numbered consecutively from one (1) to one thousand (1000), both numbers inclusive, for the principal sum of one thousand dollars (\$1,000) each, payable at the office of

Detroit Trust Company, Detroit, Michigan, to the bearer or registered holder, said bonds to be dated the first day of September, A. D. 1910, and to bear interest at the rate of six per centum (6%) per annum, payable semi-annually on the first day of March and the first day of September of each year, said interest to be payable at the office of Detroit Trust Company, Detroit, Michigan, and to be represented by interest coupons attached to said bonds, which coupons shall be signed by the lithographed signature of the secretary of this company, and that said bonds [26] shall become due and payable in twenty (20) series as follows, to wit:

\$50,000.	Bonds Nos.	1 to 50 inclusive on March	1, 1911
\$50,000.	Bonds Nos.	51 to 100 inclusive on September	1, 1911
\$50,000.	Bonds Nos.	101 to 150 inclusive on March	1, 1912
\$50,000.	Bonds Nos.	151 to 200 inclusive on September	1, 1912
\$50,000.	Bonds Nos.	201 to 250 inclusive on March	1, 1913
\$50,000.	Bonds Nos.	251 to 300 inclusive on September	1, 1913
\$50,000.	Bonds Nos.	301 to 350 inclusive on March	1, 1914
\$50,000.	Bonds Nos.	351 to 400 inclusive on September	1, 1914
\$50,000.	Bonds Nos.	401 to 450 inclusive on March	1, 1915
\$50,000.	Bonds Nos.	451 to 500 inclusive on September	1, 1915
\$50,000.	Bonds Nos.	501 to 550 inclusive on March	1, 1916
\$50,000.	Bonds Nos.	551 to 600 inclusive on September	1, 1916
\$50,000.	Bonds Nos.	601 to 650 inclusive on March	1, 1917
\$50,000.	Bonds Nos.	651 to 700 inclusive on September	1, 1917
\$50,000.	Bonds Nos.	701 to 750 inclusive on March	1, 1918
\$50,000.	Bonds Nos.	751 to 800 inclusive on September	1, 1918
\$50,000.	Bonds Nos.	801 to 850 inclusive on March	1, 1919
\$50,000.	Bonds Nos.	851 to 900 inclusive on September	1, 1919
\$50,000.	Bonds Nos.	901 to 950 inclusive on March	1, 1920
\$50,000.	Bonds Nos.	951 to 1000 inclusive on September	1, 1920;

all of which said bonds, except those of the first series, shall be redeemable at the option of this Company, by the payment to the holders thereof or to Detroit Trust Company for the benefit of such holders, of the principal thereof, together with accrued interest thereon, and a premium of two per centum (2%) upon the principal, on March 1, 1911, or on any interest payment day thereafter before their respective absolute date of maturity; provided that thirty (30) days' previous notice thereof is given as provided in the mortgage or deed of trust securing said bonds, such redemption and payment, if made, to be in the numerical order of said bonds.

AND BE IT FURTHER RESOLVED, that in order to secure the payment of said bonds and interest thereon, the president and secretary of this corporation shall make, execute, acknowledge and deliver in the name of this company and under its corporate seal, a mortgage or deed of trust, bearing even date with said bonds, upon all of the property above mentioned, and all other structures, [27] buildings and property now or hereafter in or upon the premises above mentioned, said mortgage or deed of trust to be made to Detroit Trust Company and Alexander McPherson, both of Detroit, Michigan, as trustees, and to contain such more particular descriptions, and such conditions and covenants for the payment of insurance and taxes and other charges, and rights to operate on said timber lands, and for foreclosure in case of default, and any other conditions, provisions and covenants as may seem necessary or proper to the president

of this corporation; and the bonds and mortgage or deed of trust shall be such form and language as shall be approved by the president of this corporation;

AND BE IT FURTHER RESOLVED, that the said bonds, and the whole thereof, may be sold and disposed of by the president in such lots and parcels, and in such manner and upon such terms as he shall deem proper; and

AND BE IT FURTHER RESOLVED, that the president and secretary be and they hereby are expressly authorized, empowered and directed to do and perform each and every act, deed and thing whatsoever, which to them shall seem requisite or necessary or proper to fully carry out the objects and intent of these resolutions.

AND WHEREAS, the secretary of the said S. E. Slade Lumber Company thereafter, and on the fifteenth day of July, 1910, deposited in the United States mail at San Francisco, California, with postage fully prepaid, copies of said preamble and resolutions hereinbefore set forth, addressed to each of the stockholders of said Lumber Company at his place of residence, and thereafter, and on the sixteenth day of July, 1910, the holders of all of the subscribed or issued capital stock of said S. E. Slade Lumber Company filed with the said secretary of said Lumber Company their written assents to said preamble and resolutions:

AND WHEREAS, thereafter, and after said written assents of all the stockholders, holding all of the issued and outstanding capital [28] stock of said

Lumber Company had been filed with said secretary and before the execution and delivery of this indenture to the said parties of the second part, to wit, on the sixteenth day of July, A. D. 1910, a certificate under the corporate seal of said Lumber Company was made and signed by the president and secretary thereof, and by a majority of the directors thereof, showing a compliance by said Lumber Company with the requirements of subdivision Fifth of Section 359 of the Civil Code of the State of California, and showing also the amount of bonded indebtedness so originally created, and that all of the stock of said Lumber Company was represented by the said written assents so filed with said secretary, which said certificate also stated the total number of issued shares of the capital stock of said party of the first part and was verified by the oath of the president and secretary of said first party, and was in manner and form as provided by law, and which said certificate, before the execution and delivery of this indenture to said parties of the second part, was on the sixteenth day of July, 1910, duly filed as required by law, in the office of the clerk of the city and county where the original Articles of Incorporation of said Lumber Company are filed, to wit: In the office of the clerk of the city and county of San Francisco, State of California, and a certified copy of said certificate, duly certified by the said clerk of the city and county of San Francisco, was thereafter and before the execution and delivery of this indenture to said parties of the second part, to wit, on the nineteenth day of July, 1910, duly filed in the

office of the Secretary of State of the State of California; and

WHEREAS, it has been determined and agreed by the president and secretary of said Lumber Company and by the trustee, that the bonds and coupons shall be in substantially the following form, to wit:
[29]

UNITED STATES OF AMERICA.

STATE OF CALIFORNIA.

No. ———. \$1000

S. E. SLADE LUMBER COMPANY
SIX PER CENT FIRST MORTGAGE GOLD
BOND.

KNOW ALL MEN BY THESE PRESENTS:
That the undersigned, S. E. Slade Lumber Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, for value received, acknowledges itself to owe, and hereby promises to pay to the bearer, or, if registered, to be the registered holder hereof, the sum of one thousand dollars (\$1,000) at the maturity of this bond, as hereinafter fixed, together with interest thereon from the date hereof until paid, at the rate of six per centum (6%) per annum, payable semi-annually on the first day of March and the first day of September in each year, upon the presentation and surrender of the annexed interest coupons as they severally become due, except that the bonds of the first series maturing March 1, 1911, as hereinafter set forth, bear only one coupon, viz.: of March 1, 1911; both principal and interest being payable in gold coin of the United States of America, of or

equal to the present standard of weight and fineness, at the office of the Detroit Trust Company, Detroit, Michigan.

Both principal and interest of this bond are payable without deduction for any tax, charge or assessment which the undersigned may be permitted or required to pay or retain therefrom, by whatsoever authority the same may be levied.

This bond is one of one thousand (1,000) bonds, numbered consecutively from one (1) to one thousand (1,000), both numbers inclusive, for the principal sum of one thousand dollars (\$1000) [30] each, all being of the same date, and which become due and payable in twenty (20) series as follows, to wit:

\$50,000.	Bonds Nos.	1 to	50 inclusive on March	1, 1911
\$50,000.	Bonds Nos.	51 to	100 inclusive on September	1, 1911
\$50,000.	Bonds Nos.	101 to	150 inclusive on March	1, 1912
\$50,000.	Bonds Nos.	151 to	200 inclusive on September	1, 1912
\$50,000.	Bonds Nos.	201 to	250 inclusive on March	1, 1913
\$50,000.	Bonds Nos.	251 to	300 inclusive on September	1, 1913
\$50,000.	Bonds Nos.	301 to	350 inclusive on March	1, 1914
\$50,000.	Bonds Nos.	351 to	400 inclusive on September	1, 1914
\$50,000.	Bonds Nos.	401 to	450 inclusive on March	1, 1915
\$50,000.	Bonds Nos.	451 to	500 inclusive on September	1, 1915
\$50,000.	Bonds Nos.	501 to	550 inclusive on March	1, 1916
\$50,000.	Bonds Nos.	551 to	600 inclusive on September	1, 1916
\$50,000.	Bonds Nos.	601 to	650 inclusive on March	1, 1917
\$50,000.	Bonds Nos.	651 to	700 inclusive on September	1, 1917
\$50,000.	Bonds Nos.	701 to	750 inclusive on March	1, 1918
\$50,000.	Bonds Nos.	751 to	800 inclusive on September	1, 1918
\$50,000.	Bonds Nos.	801 to	850 inclusive on March	1, 1919
\$50,000.	Bonds Nos.	851 to	900 inclusive on September	1, 1919
\$50,000.	Bonds Nos.	901 to	950 inclusive on March	1, 1920
\$50,000.	Bonds Nos.	951 to	1000 inclusive on September	1, 1920;

issued by S. E. Slade Lumber Company under its charter and statutory powers, and secured, without preference or priority of security of one bond over another, by a first mortgage or deed of trust, bearing even date herewith, duly executed, acknowledged, delivered and recorded according to the laws of the States of California and Washington by the undersigned to Detroit Trust Company and Alexander McPherson, both of Detroit, Michigan, as trustees covering, mortgaging and conveying to said trustees, in trust, certain real estate and property situated in the State of Washington; to which mortgage or deed of trust reference is hereby made for a description of the property, the nature and extent of the security, the rights of the holders of the bonds under the same, and the terms and conditions under which the bonds are issued and secured.

It is Expressly Agreed and made a part hereof that this bond, before its absolute date of maturity, provided it is not one of the first series maturing March 1, 1911, may, at the option of the undersigned [31] be redeemed and paid on March 1, 1911, or on any interest payment day thereafter, upon payment by the undersigned to the holder hereof, or to Detroit Trust Company for the benefit of the holder hereof, of the principal hereof, and all interest due hereon at the date fixed for such redemption, together with a premium of two per centum (2%) upon the principal, provided thirty (30) days' previous notice of its intention to exercise its said option to make such redemption and payment hereof, before maturity, shall be given by the undersigned,

in the manner provided in said mortgage or deed of trust, such redemption and payment, if made, to be in the numerical order of said bonds.

This bond shall pass by delivery, unless registered, but it may be registered as to principal in the owner's name on the books of Detroit Trust Company in its office in Detroit, Michigan, such registry being noted hereon by the said Trust Company, after which only such registered owner or the legal representative of such owner shall be entitled to receive the principal hereof, and no transfer shall be valid unless made on said Trust Company's books by the registered owner in person, or by the legal representative of such owner, and similarly noted hereon, but the same may be discharged from registry by transfer to bearer, after which it shall be transferable by delivery, but it may be registered again as above.

This bond shall not become obligatory for any purpose until the trustee's certificate indorsed hereon is signed by said Detroit Trust Company, Trustee.

IN WITNESS WHEREOF, S. E. Slade Lumber Company has caused this bond to be signed by its president and attested by its secretary, under its corporate name and seal, and the interest coupons or coupon hereto attached to be authenticated by the fac-simile [32] signature of its secretary this first day of September, A. D. 1910.

S. E. SLADE LUMBER COMPANY.

[Seal]

Attest: _____,

President.

_____,

Secretary.

(FORM OF COUPON.)

No. —

\$30.00

On the first day of —, A. D. 19—, S. E. Slade Lumber Company will pay to bearer thirty dollars in United States gold coin, at the office of Detroit Trust Company, Detroit, Michigan, without deduction for taxes, being six months' interest due that day on its first mortgage gold bond of September 1st, A. D. 1910, No. —.

Secretary.

(TRUSTEE'S CERTIFICATE.)

THIS IS TO CERTIFY that this bond is one of the issue of bonds described in the mortgage or deed of trust within mentioned.

DETROIT TRUST COMPANY,

Trustee.

By _____

Secretary. [33]

NOTICE.

Nothing can be written on this bond except by an officer of Detroit Trust Company as registrar, without impairing its negotiability.

Date.	In Whose Name Registered	Registrar
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.....
.....
.....

(FORM OF GUARANTY)

FOR VALUE RECEIVED, I hereby guarantee due payment of the principal and interest of the within bond.

Dated at San Francisco, California, September 1st, 1910.

(Sd.) S. E. SLADE.

Detroit Safety and Collateral Deposit Company, of Detroit, Michigan, Hereby certifies that the mortgage or deed of trust referred to in this bond is deposited with and held by it.

DETROIT SAFETY AND COLLATERAL
DEPOSIT COMPANY,

By _____,

Assistant Secretary.

NOW, THEREFORE, said S. E. Slade Lumber Company, in consideration of the premises and of one (1) dollar to it paid, the receipt whereof is hereby hereby acknowledged, in the exercise of its corporate powers, and in pursuance of the resolutions aforesaid, and in order to secure the due and punctual payment of the principal and interest of the said bonds, and the due performance of all the covenants, provisions, agreements and conditions of said bonds [34] and this instrument, on its part to be performed, and to secure all future holders of said bonds and coupons, has granted, bargained, sold, transferred, assigned, mortgaged and conveyed and warranted and by these presents does grant, bargain, sell, transfer, assign, mortgage and convey and warrant unto the parties of the second part in trust as herein provided, and their successors in trust, and assigns, with full power of succession to and enjoyment of the rights and privileges of the party of the first part, all of the lands, waterfront, timber and other property hereinafter described, together with all the buildings, structures

and improvements of every kind and character that are now, or may hereafter be placed upon said lands, and all the rights, ways, privileges, servitudes, appurtenances, and prescriptions thereto belonging or in anywise appertaining, and especially including all lumber-mills and lumber-mill plants, sawmills, planing-mills, machine-shops, sheds, pump-houses, blacksmith-shops, barns, oil-houses, boilers, engines, pumps, machinery, sprinkler systems, fire apparatus, kilns, power houses, tools, fixtures, furniture, appliances, shafting, conveyors, electric apparatus, office buildings, logging roads, tramways, railways and appurtenances, rolling stock, locomotives and cars, loaders, rails, ties, stations, platforms, lumber and logging camps and equipments, mill sites and lumberyards, booms, dwelling-houses, wharves and plank-ing, patterns, boats, tanks, burners, horses, trucks and wagons, and the entire plants and equipments and all improvements or additions now or that hereafter may be erected or located on any of said lands or premises, or which are or may be hereafter connected with, appertaining to, or used in connection with the same, now owned or hereafter acquired, and all substitutions, replacements or renewals or additions to said lands, premises and property, or any part thereof, and all lands and other property which may be added thereto and brought under the terms hereof as hereinafter provided; and all the timber and other forest products on said lands and premises, or any of them, or that hereafter may be thereon; and all personal property [35] whether enumerated hereinbefore or not, now owned or which shall be

hereafter acquired by the Lumber Company, which shall be situated upon the real property hereinafter described or which shall be used in connection with any enterprise which shall be located thereon, excepting all logs, lumber and kindred products paid for in booms or on mill premises.

A particular description of said lands and premises is as follows:

All those certain pieces or parcels of land situated in the county of Chehalis, State of Washington, known and described as follows:

Lots one (1), two (2), three (3), and four (4), in Block "C"; Lots one (1), two (2), three (3) and four (4) in Block "D"; all of Blocks "F," "G" and "H"; Lot one (1) in Block fourteen (14); Lots one (1), two (2), three (3), four (4), five (5) and six (6), in Block fifteen (15);

Lots one (1), two (2), three (3), four (4), five (5), six (6), ten (10), eleven (11) and twelve (12), in Block sixteen (16); Lots one (1) to twelve (12), both inclusive, in Block seventeen (17); Lots three (3), four (4), five (5), six (6), nine (9) and ten (10), in Block eighteen (18); Lot twelve (12) in Block twenty-five (25); Lots eight (8), nine (9), ten (10), eleven (11) and twelve (12), in Block twenty-six (26); Chehalis Street South of the south line extended of the alley in Block fifteen (15); Newell Street South of the south line extended of the alley in Block fifteen (15) and sixteen (16); Harbor Street South of Grant (now Heron) Street; Kansas Street South of the South line extended of the

alley in Block seventeen (17); Kansas Street between Lot four (4) in Block "D" and Lot twelve (12) in Block twenty-five (25); the alley in Block "D"; Summit Street west of the east line of Lot twelve (12), Block twenty-five (25) extended north to Lot one (1) in Block "C"; Harbor Street north of the north line extended of the alley in Block twenty-six (26); the unnamed street lying between Blocks fifteen (15), sixteen (16) and seventeen (17) on the north, and Blocks "G" and "H" on the south; all in Samuel Benn's original plat of the town (now city) of Aberdeen, County of Chehalis, State of Washington; said Plat being recorded in the office of the Auditor of said County of Chehalis, in Book one (1) of Plats, page thirty-nine (39).

Lot one (1), Tract twenty-five (25), and all of Tract thirteen (13), Aberdeen Tide Lands; all the above in Lot two (2), Section nine (9), Township seventeen (17), North of Range nine (9), west of the Willamette Meridian, in Chehalis County, State of Washington. [36]

Also Lots one (1), two (2), three (3), four (4) and five (5), in Block "D"; and Lots one (1), two (2), three (3), four (4), five (5) and six (6), in Block "E," in South Aberdeen; Lewis Street north of the south line of Blocks "D" and "E," South Aberdeen; all in Johnston's Plat of South Aberdeen, recorded in the office of the Auditor of said County of Chehalis, in Book one (1) of Plats, page one hundred twenty-five (125); Lots two (2) and three (3), in Tract

eleven (11), Aberdeen Tide Lands; all of the above in Lot eight (8), Section nine (9); and Lot six (6), Section ten (10), Township seventeen (17) north, Range nine (9) West, Willamette Meridian; also the south half of the southeast quarter (S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$) of Section eleven (11); the northeast quarter (N. E. $\frac{1}{4}$), and the south half (S. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$), and an undivided one-half interest in the southeast quarter (S. E. $\frac{1}{4}$) of Section fourteen (14); also the south half (S. $\frac{1}{2}$) of Section fifteen (15); the northeast quarter (N. E. $\frac{1}{4}$), the east half of the northwest quarter (E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$), and the south half (S. $\frac{1}{2}$) of Section twenty-one (21); all of Section twenty-two (22); the east half of the northeast quarter (E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$), and the northwest quarter (N. W. $\frac{1}{4}$) of Section twenty-three (23); all of Sections twenty-seven (27) and twenty-eight (28); the southeast quarter of the northwest quarter (S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$); the northeast quarter of the southwest quarter (N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$), the south half of the southwest quarter (S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$), and the east half of Section thirty-two (32); all of Section thirty-three (33); the northeast quarter and the southwest quarter (N. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$) of Section thirty-four (34); all in Township twenty-one (21), North of Range nine (9) west, Willamette Meridian; also, the leasehold interest held under and by virtue of a lease from the State of Washington to said S. E. Slade Lumber

Company, dated March 10, 1910, and recorded May 17, 1910, in the office of the Auditor of said County of Chehalis, in Book twenty-nine (29) of Miscellaneous Records, page five hundred fifty-two (552), in and to part of Harbor area in front of the following described property, viz.: Lots two (2) and three (3), Tract eleven (11), and Tract thirteen (13), Aberdeen Tide and Shore Lands more particularly described as follows: All Harbor area lying in front of Lots two (2) and three (3), Tract eleven (11), Aberdeen Tide and Shore lands, and bounded by the inner and outer harbor lines and the northeasterly line of Lot two (2), and the southwesterly line of Lot three (3), produced across the harbor reserve to the outer harbor line; also all harbor area lying in front of Tract thirteen (13), Aberdeen Tide and Shore Lands and bounded on the northwesterly side by the inner harbor line, and on the southeasterly side by the outer harbor line, and on the southwesterly side by a line drawn from angle point number eleven (11) on the outer harbor [37] line to angle point number eleven (11) on the inner harbor line, and on the east side by the east line of said Tract thirteen (13) produced across the harbor reserve to the outer harbor line, all as shown on official maps of Aberdeen Tide and Shore Lands on file in the office of the Commissioner of Public Lands at Olympia, Washington; all situate and being in the county of Chehalis, State of Washington; (excepting existing rights of way, property and

appurtenances of Railroad and Railway Companies; also excepting all public roads and such mineral claims and rights of way for ditches and canals and other rights as are reserved by the United States in its patents to the respective lands).

Also all railroad rails and angle-irons, and four (4) locomotives now belonging to "Lumber Company," and now situate and being in Township 18 North, of Range 6 West, Willamette, Meridian, or adjacent thereto, said rails and angle-irons now constituting a part of a railroad running into said Township 18 North, of Range 6 West, Willamette, Meridian, from a junction point on the Northern Pacific Railroad, commonly known as "Mack's," and said locomotives being now operated on said railroad. It being the intention of said "Lumber Company" to cover in this instrument said rails, angle-irons and locomotives, whether same are used upon or in connection with the lands in said Township 18 North, of Range 6 West, Willamette Meridian, or upon or in connection with any other land or lands whether belonging to "Lumber Company" or otherwise, whether same are covered by the provisions of this mortgage or otherwise, so that said rails, angle-irons and locomotives shall be at all times hereafter, where-soever they are situated, covered by the terms of and subject to the lien created by this instrument. Provided, however, that it is expressly agreed between the "trustee" and the "Lumber Company" that said "Lumber Company" may

at any time prior to the removal of said rails, angle-irons and locomotives to the real estate covered by this instrument, dispose of said rails, angle-irons and locomotives, or any part or parcel thereof, as it may desire and at such price as it may deem satisfactory, and without first securing permission therefor from "trustee," with the express understanding that said "Lumber Company" shall pay over to "trustee" the proceeds of any such sale or sales or disposals of said rails, angle-irons or locomotives, or any part or parcel thereof, said proceeds to be placed in the sinking fund hereinafter provided for, or shall in default thereof furnish to the "trustee" hereunder by appropriate instruments to be approved by said "trustee,"

other property equal in value to the property sold as above provided for, to take the place of said property so sold or disposed of, as security **under the** terms of this instrument. [38]

TO HAVE AND TO HOLD all and singular the above mentioned and described property and every part and parcel thereof (subject to the exceptions and reservations aforesaid), together with all the rights and appurtenances thereunto belonging, and the rents, tolls, incomes, issues, earnings and profits therefrom accruing, unto the said trustees, parties of the second part, and their successors and assigns, **FOREVER.**

IN TRUST, NEVERTHELESS, for the equal pro rata use, benefit and security of each and all and every the persons, firms, associations and corpora-

tions, who are, or shall be, or in time become, the holder or holders of any of said bonds or the coupons appertaining thereto, issued under and secured by this indenture, for the enforcement of the payment of said bonds and interest, when payable, according to the tenor and purport and effect of said bonds and coupons, and to secure the performance and observance of and compliance with the covenants, provisions, agreements and conditions of this indenture; and without preference, priority or distinction of one bond or coupon over any other bond or coupon, by reason of priority in issue, sale or negotiation thereof, or by reason of the purpose of its issue, or otherwise, howsoever, so that each and every bond issued hereunder shall have the same right, lien and privilege, under and by virtue of this indenture, and so that the principal and interest of every such bond shall, subject to the terms thereof and of this indenture, be equally and proportionately secured hereby.

PROVIDED ALWAYS, and these presents are upon the express condition that if S. E. Slade Lumber Company, party of the first part, or its successors or assigns, shall well and truly pay or cause to be paid to the holders of said bonds and coupons, when the same shall become due and payable, the principal and interest thereon, and any and all moneys secured thereby (without deduction of any United States, state, county or municipal or other taxes, charges or assessments, which the Lumber Company [39] may be required or permitted to

pay or retain therefrom by any present or future law), according to the terms, provisions, conditions and tenor or effect of the said bonds and coupons, and shall well and truly keep and perform the provisions, covenants, agreements and conditions to be kept and performed by it, as herein provided, then these presents and the estate hereby granted shall cease and determine as fully as if this indenture had never been executed; and

PROVIDED ALWAYS, and these presents are upon the express conditions that, until default shall be made by S. E. Slade Lumber Company, or its successors or assigns, in the payment of the principal or interest due upon said bonds or some part thereof, as therein or herein provided, or until default shall be made in the due and punctual performance or keeping of any of the covenants, provisions, agreements and conditions to be kept and performed by said S. E. Slade Lumber Company, it, the said party of the first part, its successors or assigns, shall be suffered and permitted to possess and enjoy all of said property and premises, with the appurtenances, and all and singular the rights and privileges hereinbefore described, and to receive, take and use the rents, tolls, incomes, issues, earnings and profits thereof.

IT IS FURTHER DECLARED AND AGREED by the parties hereto, that this indenture is made under the following stipulations, agreements and conditions which shall be binding upon the parties hereto, their successors and assigns, and upon future

holders of the bonds and coupons hereby secured, to wit:

ARTICLE I. S. E. Slade Lumber Company does hereby expressly agree and bind itself, its successors and assigns, not to alienate or in any manner incumber the property hereby mortgaged or conveyed, except as hereinafter provided,

ARTICLE II. S. E. Slade Lumber Company, its successors and assigns, shall have the right, on March 1, 1911, or [40] on any interest payment date thereafter, before their date of absolute maturity, to redeem and pay the bonds hereinbefore described, except those of the first series, to the holders thereof or to said Detroit Trust Company, for the benefit of the holders thereof at the rate of one hundred and two (102) cents on the dollar of the principal of said bonds and the interest accrued to such date, by forwarding to said Detroit Trust Company, by way of notice, not less than thirty (30) days prior to the date of the proposed redemption, a certified copy of a resolution of its board of directors, stating the numbers of the bonds which shall be redeemed; Provided, that not less than twenty-five thousand dollars (\$25,000) of principal of the bonds aforesaid shall be redeemed and paid hereunder at any one time; and Provided Further, that if S. E. Slade Lumber Company redeems and pays only a part of said bonds, the bonds so redeemed and paid shall be redeemed and paid in their numerical order. On depositing with said Detroit Trust Company the amount of the principal of said bonds paid for at one hundred and two (102) cents on the dollar, and

all accrued interest to the proposed date of redemption and payment, further interest on said bonds shall cease from the date fixed for the redemption thereof.

Provided, However, that said deposit be made at least five (5) days prior to the redemption date. On receiving such notice, Detroit Trust Company shall give notice of the redemption to the holders of all bonds to be redeemed, by publication, designating the numbers of said bonds to be so redeemed, said publication to be made in a daily newspaper of general circulation published in the city of Detroit, Michigan; such notice shall be published at least once in each week for two (2) successive weeks prior to the date of redemption. If any of such bonds proposed to be redeemed are registered, then a copy of such notice shall be mailed by Detroit Trust Company to the postoffice address of the party in whose name said bond is registered, as such address may appear on the bond register. All expense [41] of such publication and mailing of notices shall be borne by the Lumber Company and shall be paid by it in advance to said Detroit Trust Company, which latter shall not be required to act hereunder until such payment is duly made.

All bonds and coupons surrendered to the trustee and paid and redeemed, whether under the provisions of this article or otherwise, shall be cancelled by the trustee and delivered to the Lumber Company, and shall not thereafter be reissued.

ARTICLE III. While the Lumber Company shall be in possession of the premises and property covered by this instrument, it is understood and

agreed that the Lumber Company shall have the right to cut or remove timber from said premises or of the timber covered hereby, and convert the same to its own use, upon the following terms and conditions: Before beginning to cut or remove any such timber the Lumber Company shall file with the trustee due and sufficient information, with maps, plats, facts and figures showing and advising the trustee of the location and quantity of the timber which it is proposed to cut or remove during each month of the period during which such cutting or removal is proposed to continue; all duly verified by the signature of the president or secretary of the Lumber Company; the quantity of such timber shall be determined by the estimates of James D. Lacey & Company, duplicate copies of which are on file in the offices of the trustee and the Lumber Company, or by other estimate satisfactory to and to be filed with and accepted in writing by the trustee; the Lumber Company shall pay to the trustee in advance on the first day of each month at the rate of three dollars (\$3) per thousand feet of stumpage for all the timber proposed to be cut or removed during that month; the amount of timber so cut or removed shall be verified at the end of each month, or as often as the trustee may in writing require; such verification shall be evidenced by the sworn statement of an officer of the Lumber [42] Company, or of some other person satisfactory to the trustee; in case such verification shall show any excess of timber over the estimates as aforesaid, the Lumber Company hereby covenants and agrees that it will immediately and without

demand pay to the trustee for such excess at the rate aforesaid; in case the amount of timber proves to be less than the estimate, the Lumber Company shall not be entitled to receive back any part of the price paid by it; all payments made under the provisions of this article shall be placed in the sinking fund hereinafter mentioned and shall be disposed of as hereinafter provided.

PROVIDED, that no timber shall be cut or removed as aforesaid without the consent in writing of the trustee while the Lumber Company is in default in payment for timber, or in payment of principal or interest or in any other covenant, provision, agreement or condition hereunder. And Provided further, that all cutting hereunder shall include all the merchantable timber included in the territory proposed to be cut over, and shall be done in a good, workmanlike manner and so as to reduce as much as possible the danger of fire.

ARTICLE IV. While the Lumber Company shall be in possession of the mortgaged premises and property, and there shall be no existing default by the Lumber Company hereunder, it is expressly understood and agreed that the parties of the second part shall, upon written request of the Lumber Company, and upon proper terms to be agreed upon by and between the Lumber Company and the trustee, release from the lien hereof the mills and mill sites and waterfront hereinbefore described, including the real estate and mill site at Aberdeen, or any part thereof, if and when the same are required by the Lumber Company for the purpose of legal and

proper consolidation with other property of similar character, provided that in such event the parties of the second part shall be protected by shipping and milling or other contracts or agreements satisfactory to the trustee, and [43] duly assigned if required by it as security hereunder by instrument or instruments of assignment satisfactory and acceptable to the trustee. It is hereby expressly understood and agreed that the terms of transfer or exchange involved in any such consolidation, and the amount, value and character of the property to be received in exchange for the property released shall be satisfactory to the trustee, and that the property so received in exchange, whether stocks, bonds, cash, agreements, or other property, shall, by proper instrument or instruments, in form and substance to be approved by the trustee, be brought under the lien of this indenture.

ARTICLE V. The Lumber Company shall have full power and authority from time to time, while it shall not be in default hereunder, to dispose of such portions of its equipment and machinery covered by this instrument as may become unfit for use or unnecessary, provided it shall replace the same by other or new equipment satisfactory to the trustee, of equal value and availability, and free and clear of any incumbrances, lien, charge or claim whatsoever, and which shall thereupon become subject to the lien and operation of this instrument; and the trustee shall have power from time to time, together with Alexander McPherson, or his successor in trust, to release from the lien of this instrument any prop-

erty whatsoever covered hereby, when other property of equal value is substituted therefor in manner approved by the trustee, which property shall be thereby, by such substitution, subject to the lien and operation of this instrument; or when in the judgment of the trustee said release shall not impair the security of this instrument in any manner; or when there shall be paid to the trustee for the sinking fund herein provided for a sum equal, in the judgment of the trustee, to the value of the property released; such value in the case of release of timber may, in the discretion of the trustee, be based upon the estimates thereof on file in the office of the trustee, or upon other estimates or information satisfactory [44] to the trustee; the trustee may execute and cause to be executed and deliver such release or other instrument upon receiving from the president or secretary of the Lumber Company a sworn statement of such officer that the property to be so released is no longer necessary for use in the conduct of the business of the Lumber Company, and that full value has been received therefor by said Lumber Company; or the trustee may require such other proof or evidence, or make such investigation as to it may seem best before the execution of said release. Such sworn statement shall be a full protection to the parties of the second part. Nothing herein stated shall be construed as implying an obligation on the part of the trustee or Alexander McPherson, or his successor in trust, to release any part or portion of the property covered by this instrument, as provided in this Article.

ARTICLE VI. The Lumber Company further agrees that it will keep the insurable property covered by this indenture, at all times insured against loss or damage by fire or boiler explosion, or other loss or damage in the discretion of the trustee, in insurance companies and in amounts approved by the trustee, and will deposit with the trustee all policies for whatsoever insurance is written. The policies of insurance shall provide by proper stipulations that in case of loss the same shall be payable to the trustee, as its interest may appear. Should the Lumber Company fail to take out and deliver to the trustee, policies of insurance, as above required, in that case the trustee is authorized, but is not hereby required, to procure insurance as aforesaid for the benefit of the bondholders; and all sums expended by the trustee in premiums for insurance shall be, and hereby are secured by this indenture, payable forthwith with interest thereon at the rate of seven per centum (7%) per annum, payable semi-annually. In case of loss, the trustee shall, subject to the proviso hereinafter contained, allow the insurance money received on any policy of insurance procured by the Lumber Company, [45] or by the trustee, to be applied by the Lumber Company toward the replacement of or addition to the property destroyed or injured, if the Lumber Company shall in writing so request. The trustee shall, upon such request, pay over to the Lumber Company for that purpose, either ratably as the work progresses, or when the work is completed, at the option of the Lumber Company, on receipt of affidavits of the

president and secretary thereof, showing that said property has been replaced by new or additional property, costing as much as the amount of money so paid over, any or all of the said insurance money received by the trustee on policies procured by the Lumber Company or the trustee. If the Lumber Company shall not, within six months after the time the trustee shall receive said insurance money, request the same for the purpose of replacing the property destroyed or injured, then the said money shall be placed in the sinking fund hereinafter mentioned, and shall be disposed of as hereinafter provided. If at any time after the receipt of said insurance money by the trustee, the Lumber Company desires the same or any part thereof to be placed in the sinking fund, it shall be so placed at the request in writing of the Lumber Company. Provided, However, that should the Lumber Company be in default, in any respect under this mortgage at any time before the trustee shall have paid out such insurance moneys, as aforesaid, then the trustee may, in its discretion, place such insurance moneys or any balance thereof in its hands, in the sinking fund. In case of any loss covered by any policy of insurance, any appraisement or adjustment of such loss and settlement and payment of indemnity therefor, which may be agreed upon between the Lumber Company and any insurance company, may be consented to and accepted by the trustee, and the said trustee shall be in no way liable or responsible for the collection of any insurance in case of loss.

ARTICLE VII. The sums of money that shall be paid to the trustee for timber, or for releases of property as hereinbefore [46] provided, shall be placed in the sinking fund, and together with any insurance moneys that may be placed in said sinking fund in case of loss, as hereinbefore provided, shall be held by the trustee in such sinking fund to pay the principal of the hereinbefore described bonds, or so many as may be then outstanding, and the interest on said bonds, as they severally become due. If there should be a balance after paying all bonds and interest due, it shall be applied without request therefor, to the payment of the principal and interest of the bonds first falling due thereafter, provided that the Lumber Company may, by notice as hereinbefore provided, require that said balance shall be applied to the redemption of bonds as hereinbefore set forth.

The trustee shall pay interest on all amounts so deposited with it for the sinking fund, at the rate of two per cent (2%) per annum during the time, not less than one (1) month, the same is held by it, which interest shall be credited to or paid into the sinking fund and shall constitute a part thereof.

ARTICLE VIII. The Lumber Company agrees and covenants that it will duly and punctually pay or cause to be paid, to the holder of every bond and coupon issued hereunder and secured hereby the principal and interest accruing thereon (together with interest at six per cent per annum on all defaulted coupons), all in gold coin of the United States of America, of or equivalent to the present

standard of weight and fineness, at the date and place and in the manner mentioned in said bonds or in the coupons thereto appertaining, according to the true intent and meaning thereof, subject only to the right of the Lumber Company to redeem said bonds under Article II hereof, without deduction, (except of such amount as may be necessary to avoid any legal charge or usury), from either principal or interest for any taxes, assessments, rates or charges which may be imposed in the premises, including those based on this instrument, or the indebtedness at any time secured thereby, whether treated as an interest in [47] the property covered hereby or otherwise, and without deduction (except of such amount as may be necessary to avoid any legal charge of usury), from either principal or interest on account of any taxes, assessments, rates, or charges which the Lumber Company may be required or permitted to pay or retain, under any present or future law of the United States, or of any state, county or municipality therein; and to that end the Lumber Company shall deposit with the trustee at least five (5) days before each respective maturity date of both principal and interest, funds sufficient when added to the sinking fund available for that purpose, to pay the same, as aforesaid; and in the event that the Lumber Company, not being in default in any respect hereunder, shall deposit with the trustee, for the benefit of the holders of the outstanding bonds and coupons secured hereby, the full sum required to liquidate and discharge all such outstanding bonds and coupons up to maturity, ac-

according to the tenor and effect thereof, and according to the terms of this instrument, and the costs and expenses of this trust, accrued and to accrue, the Lumber Company shall be entitled to have this instrument released in like manner as if full payment of said bonds and coupons had been made to the holder or holders thereof, and all of said bonds and coupons thereupon cancelled. And in that case the said parties of the second part and their successor or successors in trust, shall, on demand of the Lumber Company, and upon payment to the trustee of its reasonable expenses, including disbursements and attorney's fees incurred by it in the premises, execute and deliver to the Lumber Company all such instruments as may be necessary to discharge and cancel this mortgage of record.

ARTICLE IX. The Lumber Company, as and when the same shall become due and payable, will pay all taxes, assessments, rates and charges of every name and nature which have been or shall be imposed, assessed or levied upon or against the property covered hereby, or any part thereof, or upon or against or [48] on account of the debt secured hereby, or any part thereof, or upon or against the interest of the said parties of the second part, or either of them, or their successors, or the holders of the bonds and coupons secured hereby or any of them in said property or any part thereof, or upon or against the product, income or profit derived therefrom, or upon or on account of this instrument, provided, that in no case shall the Lumber Company be required hereby to pay the whole of any tax,

assessment, rate or charge, the payment whereof in full would create a usurious burden upon it, but it shall be bound hereby to pay only so much thereof as can be done without creating such usurious burden; and provided further, that upon the enactment of any future legislation whether State or Federal or upon the operation of any present law upon this instrument, whereby the payment in full of any such taxes or assessments as aforesaid would create such usurious burden, this instrument and the whole sum then secured hereby shall mature and become immediately due and payable, anything herein contained to the contrary notwithstanding and the Lumber Company will also pay punctually, from time to time, all laborers' and mechanics' liens, and all other liens and charges lawfully imposed on the property covered hereby, or any part thereof, so that the priority of these presents shall at all times be fully maintained and preserved; and the Lumber Company further covenants that it will not suffer to be done or permit any act, matter or thing whatsoever whereby the lien of this instrument might or could be impaired, until the bonds hereby secured, and all interest accrued thereon, shall be fully paid and satisfied; and the Lumber Company hereby waives any and all claims or rights against the parties of the second part, their successors or assigns, to any payment or rebate on or offset against the interest or principal of the debt secured hereby by reason of the payment as aforesaid of any of the aforesaid taxes, assessments, rates, charges or liens;

and will deliver the receipts therefor, if required, to [49] the trustee; and the Lumber Company will do, on demand of the trustee, its successors or assigns, all acts necessary or proper to keep valid the lien by these presents created, and intended to be created, and at any future time, and as often as necessary, will execute, on demand as aforesaid, all such assurances, deeds, mortgages and other instruments in writing, in due form and effect, as may be proper to the better carrying out of the true intent and meaning of these presents.

ARTICLE X. If the Lumber Company shall make default in the payment of any taxes, assessments, rates, charges or liens, as herein provided, and whether the same are now due and unpaid or may hereafter become due, the trustee its successors or assigns, may pay the same and the sums so paid shall be and hereby are secured by this instrument, and all such sums, as well as all sums paid by the Trustee for premiums of insurance, shall be payable forthwith by the Lumber Company, with interest at the rate of seven per cent (7%) per annum, payable semi-annually.

ARTICLE XI. In case (1) default shall be made in the payment of any of the principal or any of the interest money specified in said bonds or coupons, or any or either of them, and any such default shall continue for a period of thirty (30) days after the same becomes due and is demanded, or (2) default shall be made in the due observance or performance of any other covenant, agreement, provision or condition herein required to be kept or performed by

the Lumber Company, and any such default shall continue for a period of thirty (30) days after written notice thereof to the Lumber Company from the trustee or from the holder of any of the outstanding bonds hereby secured, the trustee, or its successor or successors in the trust hereby created, may, and if thereunto requested in writing by the holder or holders of a majority in amount of the said bonds then outstanding, shall declare the principal of all the bonds [50] hereby secured and then outstanding to be and the same shall thereupon become immediately due and payable, anything contained in said bonds or herein to the contrary notwithstanding. This provision is, however, subject to the condition that if at any time after the principal of said bonds shall have been so declared due and payable, all arrears of interest upon such bonds (with interest on overdue instalments of interest), the principal of all bonds which by their terms are past due, and the expenses of the trustee shall be paid by the Lumber Company or collected out of the mortgaged property, and any other default or defaults of the Lumber Company adjusted before any sale of the said property shall have been made, then, and in every such case, the holder or holders of a majority in amount of the bonds hereby secured and then outstanding, by written notice to the Lumber Company and to the trustee, may waive such default and its consequences and obtain from the trustee a rescission of such declaration of the maturity of the principal; but no waiver or rescission shall extend to

or affect any subsequent default or impair any right consequent thereon.

ARTICLE XII. In case (1) default shall be made in the payment of any of the principal or any of the interest money mentioned in said bonds or coupons, or any or either of them, and any such default shall continue for a period of thirty (30) days after the same becomes due and is demanded, or (2) default shall be made in the due observance or performance of any other covenant, agreement, provision or condition herein required to be kept or performed by the Lumber Company, and any such default shall continue for a period of thirty (30) days after written notice thereof to the Lumber Company from the trustee, or from the holder of any of the outstanding bonds, hereby secured, the trustee, either by its own officers, or by its agents or attorneys, may, and (unless proceedings for the foreclosure of this instrument and the appointment of a receiver, as hereinafter provided are instituted) upon the written request of the [51] holders of a majority in amount of the bonds secured hereby, and then outstanding, and upon being indemnified to its satisfaction for its expenses and liabilities, shall forthwith enter into and take full possession of the property hereby mortgaged or intended so to be, and each and every part thereof, and hold, use and manage the same, by such agents and managers as said trustee may appoint, to the best advantage of the holders of the bonds hereby secured and to the fullest extent authorized by law, collect and receive all moneys and revenues

arising from such management, and apply the same to the expenses of the trustee in the performance of the trust, including a reasonable compensation for its own services, the services of its counsel, attorneys, agents and other servants, and next to the management of the property hereby mortgaged, including the payment of insurance and of taxes, assessments, rates and other governmental charges, and any liens or other charges, lawfully imposed upon said property, and such useful additions, alterations or repairs to the mortgaged property, or any of it, as the trustee may think proper to be made, and next to the payment pro rata of the principal and interest due and in default on said bonds. In case all the said payments shall have been made in full, and no suit to foreclose this mortgage shall have been begun, the trustee after making such provisions as to it may seem advisable for the payment of the next semi-annual instalment of principal and interest to fall due, shall restore to the party of the first part, its successors or assigns, the possession of the property hereby mortgaged. This power of entry may be exercised as often as occasion therefor shall arise, pending this trust, and the trustee may, so long as any principal or interest remains in default, continue to exercise the power herein granted for such period or periods as it may deem expedient, unless and until the holders of a majority in amount of bonds secured hereby, then outstanding, shall otherwise in writing request. [52]

In case the Lumber Company shall make any default in any of the respects mentioned in this Arti-

cle, and at any time during the continuance of such default there shall be any existing judgment against the Lumber Company unsatisfied and unsecured by bond or appeal; or in case, in any judicial proceeding commenced by any party or parties other than the trustee herein, a receiver of the Lumber Company or of any of its property hereby conveyed shall be appointed, or a judgment or order entered for the sequestration of its property hereby mortgaged, or any part thereof, the trustee shall be entitled forthwith to exercise the right of entry hereinabove conferred, and may declare the principal of all bonds hereby secured and then outstanding due and payable, and may institute foreclosure proceedings or take other legal action to collect the amount of said bonds and coupons with interest, or to obtain possession of said property, or may exercise any one or more of such rights or remedies without waiting the default period hereinabove prescribed, and also any and all other rights and powers in this instrument conferred and provided to be exercised by the trustee upon the occurrence and continuance of default, as hereinabove provided; and as a matter of right the trustee shall forthwith be entitled to the appointment of a receiver for the property hereby mortgaged and of the earnings, income, issues, and profits thereof, with such powers as the court making such appointment shall confer.

ARTICLE XIII. None of the remedies hereinbefore described shall be regarded as other than cumulative, and the trustee may proceed to foreclose this indenture or otherwise enforce its rights or the

rights of any of the holders of bonds or coupons hereby secured, against the Lumber Company, its successors or assigns, or the property hereby mortgaged, in any court of competent jurisdiction, in the premises, in accordance with and in pursuance of the laws of the State of Washington, or of the [53] State of California, or of the United States of America, and may seek all remedies, both provisional and final, allowed by such court, without any demand for possession and without any of the steps by either party in connection with the remedies hereinbefore described, provided only that some default, refusal, neglect, omission or failure has occurred on the part of the Lumber Company in the manner herein provided as to the discharge of its covenants and obligations herein. And the Lumber Company covenants and agrees that it will not apply for or avail itself of any injunction or stay proceeding, or plead or in any way take advantage of any extension law, valuation law, redemption law, apportionment law, or of any other law now or at any time hereafter in force in either of the States of Washington or California, which may in any way alter, impair or impede the rights or remedies of the holders of the bonds or coupons issued hereunder, or of the parties of the second part, or either of them, or their successors in trust, or which shall affect or change the time, place, means or mode of perfecting or enforcing such rights or remedies; any advantage or benefit conferred upon it by any such laws being hereby expressly waived by the Lumber Company.

ARTICLE XIV. Upon a sale being made under a decree or order of such Court, the proceeds of such sale, together with any sums which may at the time of such sale be held by the trustee, or be payable to it under any of the provisions of this indenture as a part of the trust estate, shall be applied as follows:

1. The costs and expenses of the proceedings to foreclose this indenture, including the cost of procuring abstracts of title and tax statements, or extensions thereof, attorneys' fees and trustees' compensation, shall be first paid, and said costs and expenses and attorneys' fees and trustees' compensation shall be secured by this indenture.

2. All liens, taxes, assessments, rates and charges, and premiums of insurance paid by the trustee, with interest thereon as herein provided, and all disbursements or obligations made or incurred [54] by the trustee for the preservation or maintenance of the property herein mortgaged, or in making investigations, or otherwise as such trustee, shall next be paid in full before any payment shall be made on account of the principal and interest of the bonds secured hereby.

3. The remainder of the proceeds of sale shall then be applied ratably and equally to the payment of the principal and interest of the outstanding bonds secured hereby, with interest on the overdue instalments of interest, without preference or priority of any one bond over another, or of interest over principal, and without regard to the time at which any of said bonds may have been issued or to the person by whom they may be held.

4. Any surplus, after making the payments hereinabove provided for, shall be returned to the Lumber Company, its successors or assigns.

Upon any foreclosure sale of the property hereby mortgaged, or of any part thereof, the purchaser in making payment therefor shall be entitled, after paying in cash so much as shall be necessary to cover the costs and expenses of the sale, and of the proceedings incident thereto, including the trustees' reasonable compensation and attorneys' fees, and all other charges that may be decreed to be paid in cash, to use and apply any outstanding bonds and any matured and unpaid coupons hereby secured, by presenting such bonds and coupons in order that there may be credited thereon such sum as shall be payable thereon out of the net proceeds of the sale; and proper receipts shall thereupon be given to the holders of such bonds and coupons for the amount so payable thereon, and the bonds and coupons, if the net proceeds of the sale shall be sufficient to pay them in full, with interest on overdue instalments of interest, shall be delivered up to the person making the sale for cancellation, or otherwise disposed of under the decree or order of the court; or if the proceeds of such sale shall not be sufficient to pay such bonds or coupons in full, with interest on overdue instalments of interest, then proper indorsement shall be made thereon of the amount so paid, and they shall then be returned to the holders. [55]

ARTICLE XV. The Lumber Company, for itself, its successors and assigns, hereby further covenants and agrees to and with the parties of the second

part, that at and immediately upon the commencement by the parties of the second part, or either of them, or their successors in trust, of any suit or other legal proceedings to obtain possession of the lands and property hereby mortgaged and conveyed, or any part thereof, or for the foreclosure of this mortgage, upon default, refusal, neglect, omission or failure upon the part of the Lumber Company, as herein provided, the Lumber Company, its successors and assigns, severally, shall and will, waiving the issuance and service of process, enter their voluntary appearance in such suit or proceeding and consent to the entry of an order for the possession of the said lands and property, and every part thereof, or to the appointment of a receiver of said lands and property and of the earnings, revenues, issues, profits and income thereof, for the sole benefit of the holders of the bonds secured hereby.

ARTICLE XVI. The Lumber Company shall and will, from time to time, on demand of the trustee, do, make, execute, acknowledge and deliver, or cause or procure to be done, made, executed, acknowledged and delivered, to the parties of the second part, or their successors in trust, all and every such further acts, deeds, mortgages, transfers and assurances for the better assuring, conveying, mortgaging and confirming to the parties of the second part, their successors and assigns, said property hereby mortgaged or conveyed, or intended so to be, as the trustee may be advised by its counsel are reasonably required for the better effectuating and carrying out of the objects, intent and purposes of this indenture, and

securing payment of the principal and interest of the bonds intended to be secured hereby.

ARTICLE XVII. The bonds secured by this instrument shall be certified and delivered by the trustee either to the president of the Lumber Company, whose receipt therefor shall be full [56] protection to the trustee for such certification and delivery, or to such other person or persons as he may in writing direct, whose receipt or receipts therefor shall in like manner be full protection to the trustee for such certification and delivery. The trustee shall be under no duty to look behind any such receipt, given as aforesaid, and shall not be in anywise responsible for the issue or negotiation of any bonds so certified and delivered, or the application of their proceeds.

ARTICLE XVIII. In case resort is had to any court to foreclose this mortgage on account of any default, refusal, neglect, omission or failure of the Lumber Company, a receiver of the mortgaged property may be appointed as a matter of course, upon application of the trustee, and the Lumber Company hereby assents to such appointment. The Lumber Company hereby consents, in the event of foreclosure, that a deficiency judgment or decree may be taken against it, under the laws of either of the States of Washington or California, or of the United States of America, to be satisfied from any other property of the Lumber Company, in case the decree or judgment of foreclosure is not satisfied at the sale of the mortgaged property.

ARTICLE XIX. In case of the resignation, incapacity or inability to act hereunder of said Detroit Trust Company, it shall be lawful for the holders of a majority in amount of the bonds secured hereby, then outstanding, to appoint a successor by a writing by them signed, or for any judge of a United States Circuit Court in the Ninth Circuit, in default of such appointment, to appoint such successor on the application of the holders of not less than one-fourth in amount of the bonds secured hereby, then outstanding. The Lumber Company may appoint a successor temporarily until a regular appointment is made in the manner hereinabove provided. Every such successor appointed in the place of said Detroit Trust Company, or its successor in trust, shall always be a trust company in good standing, doing business in the city of Detroit, Michigan, or in the city [57] of Chicago, Illinois, and having a capital stock and surplus aggregating at least one million dollars, if there be such a trust company willing and able to accept the trust upon reasonable and customary terms.

In case of the resignation, removal, incapacity or inability to act hereunder of the said Alexander McPherson, it shall be lawful for the said Detroit Trust Company, or its successor in trust, to appoint some male adult citizen of the United States to act as one of the trustees hereunder in his place.

In case of the resignation, inability or incapacity to act hereunder of said Detroit Trust Company, or its successor for the time being, and in case no successor has been appointed and until the appointment

of such successor, all the power herein given to said Detroit Trust Company shall for the time being vest in said Alexander McPherson, or his successor in trust, but the Lumber Company is not authorized in any event to make payments for the sinking fund to or make deposit of money for the redemption or payment of bonds or coupons with said Alexander McPherson or his successors in trust. And in case it shall be impossible, or be deemed impossible, by said Detroit Trust Company, or its successor for the time being, for it lawfully to do or perform any act or acts necessary or proper for it to do as trustee under the terms of this instrument, then and in such case said Alexander McPherson, or his successor for the time being, shall, with the permission in writing of said Detroit Trust Company, or its successor, have full power and authority to do and perform such act or acts of whatever nature as if he had been specifically authorized thereto. Any act so done by said Alexander McPherson or his successor in trust, shall have the same effect as if done by said Detroit Trust Company, or its successor, and shall relieve said Detroit Trust Company, or its successor, of any duty or obligation to do such act, except that any instrument given to release property from the lien hereof [58] under the provisions of Articles IV or V, or to discharge or cancel this instrument under the provisions of Article VIII hereof shall be signed by both parties of the second part, or their successors. Whenever said Alexander McPherson, or his successor, shall under the provisions of this Article exercise any of the powers or perform any of the duties granted to

the trustee by the terms of this indenture, he or his successor shall in reference to such exercise of power or performance of duty, be entitled to all the protection, immunity and recompense, both as to himself and his agents and attorneys, herein granted to the trustee in regard to such power or duty.

Any act herein required or authorized to be performed by the trustee may be performed by the trustee, or its successor in trust, and said Alexander McPherson or his successor in trust, jointly, and shall be so performed if such joint performance shall be necessary to the legality of such act. The trustee and said Alexander McPherson, or their successors, when so acting jointly, shall be entitled to all the protection, immunity and recompense herein granted to the trustee in reference to such acts.

Said Detroit Trust Company, its successors or assigns, shall have the power at any time by an instrument in writing, duly executed by its president or vice-president, and under its seal, to remove said Alexander McPherson, or his successor, from his position as one of the trustees hereunder.

ARTICLE XX. Either of the parties of the second part herein may resign and discharge itself or himself of the trust created by these presents by notice in writing to the Lumber Company, sixty (60) days before such resignation shall take effect, or such shorter time as may be accepted by the Lumber Company as adequate notice. But such resignation shall take effect upon the appointment of a successor in trust to such party of the [59] second part so resigning, if such successor in trust shall be ap-

pointed before the time limited by such notice.

ARTICLE XXI. In case any bond issued under this indenture, or any coupon thereto appertaining, shall become mutilated or destroyed, the party of the first part may issue, and thereupon the trustee shall certify and deliver a new bond of like tenor and date, and bearing the same serial number as the one mutilated or destroyed, in exchange for and in place of and upon cancellation of the mutilated bonds or coupons, or in lieu thereof and substitution for the same if destroyed. In case of the destruction of any bond or coupon issued hereunder, the applicant for the bond to be substituted therefor, shall furnish to the party of the first part and the trustee, evidence of the destruction of such bond or coupon so destroyed which evidence must be satisfactory to said party of the first part and to trustee in their discretion. And such applicant shall also furnish indemnity satisfactory to said party of the first part and the trustee in their discretion. And said applicant for such substituted bond, either in case of the mutilation or destruction of the bond or coupon for which the same is to be substituted, shall also pay all necessary expenses incurred by said party of the first part in the making and issuing of said substituted bond and coupons, including attorneys' fees, as well as all expenses incurred by the trustee in relation thereto.

ARTICLE XXII. The said Detroit Trust Company as trustee or otherwise, shall be under no obligation to recognize any person or persons, firm, association or corporation, as holder or owner of any

of the bonds secured hereby, or to do or refrain from doing any act pursuant to the demand or request of any person or persons, firm, association or corporation professing or claiming to be such holder or owner, until he, it or they shall make such demand or request in writing, and shall produce said bonds, and shall deposit them with the trustee, and shall indemnify and save harmless the trustee to its satisfaction from [60] any and all damages, costs and expenses, outlays, counsel fees and other reasonable disbursements for which it may become liable or responsible in carrying out said request or demand.

ARTICLE XXIII. Should any suit or proceeding be brought against the parties of the second part, or either of them, by reason of any matter or thing connected with the trust hereby created, or by reason of their being trustees hereunder, neither of them shall be under any obligation to appear in or defend such suit or proceeding until indemnified to its, his or their satisfaction for so doing, but may appear in and defend the same without indemnity, at their election, and in such case shall be compensated for so doing.

ARTICLE XXIV. The trustee, for itself and its successors, hereby accepts the trusts and assumes the duties hereby created and imposed upon it, but only upon the following terms and conditions, to wit:

(a) The trustee shall incur no liability to any one and shall be fully protected in acting upon any notice, request, consent, certificate, bond or other paper or document, believed by it to be genuine and to have been signed by the proper person.

(b) The trustee may select and employ in and about the execution of this trust, and especially to check up or verify any cutting of timber, to verify the value of any property to be released, to check up and examine and verify, in case of expenditures for repairs or rebuilding, where there may have been fire or other losses, suitable agents, attorneys, representatives and employees, whose reasonable compensation and expenses, including traveling expenses shall be paid by the Lumber Company to the trustee, and in default of payment of such compensation and expenses, they shall, with interest at seven per centum (7%) per annum, payable semi-annually, be a charge upon the hereby mortgaged property and premises, and the proceeds thereof, paramount to said bonds and payable immediately without demand, and the trustee shall not be answerable in any case for any act or default of any agent, attorney, representative or employee selected with reasonable discretion. The trustee, save for its gross negligence or willful default, shall not be personally liable for any loss or damage.

(c) The trustee shall have a first lien upon the mortgaged property and fund, for its reasonable expenses, counsel fees, compensation [61] and disbursements incurred in and about the execution of the trust hereby created and the exercise and performance of its powers and duties hereunder.

(d) The trustee shall be under no obligation or duty to perform any act hereunder unless requested in writing so to do and unless indemnified to its full satisfaction for so doing. The trustee shall not be

bound to recognize any person as a bondholder unless nor until his bonds are submitted to the trustee for inspection, or deposited with the trustee, if required, and his title satisfactorily established, if disputed.

(e) The exclusive right of action hereunder shall be vested in the trustee, except as hereinbefore provided, until refusal or failure or inability on its part so to act; and no bondholder shall be entitled to enforce these presents except as hereinbefore provided, until after demand made upon the trustee accompanied by tender of indemnity as aforesaid, and a refusal by the trustee to act in accordance with said demand.

(f) It shall be no part of the duty of the trustee to file or record this instrument or any instrument supplemental thereto, or renew the same, or to effect insurance against fire or other damage or risk on any portion of the mortgaged property, or to renew any policies of insurance, or to keep itself informed or advised as to the payment of any liens, taxes, assessments, rates or charges, or to pay the same or to require such payment to be made; but the trustee may, in its discretion, do any or all of these matters and things in this subdivision of this Article set forth, or require the same to be done, and any and all advances made by the trustee hereunder, in its discretion, shall constitute an additional indebtedness secured hereby, and shall be prior in lien to the bonds hereunder.

(g) The recitals of fact herein and in said bonds contained shall be taken as statements made by the Lumber Company, and shall not be construed as

made by the trustee; and the trustee assumes no responsibility as to the correctness of the same; nor is the trustee to be understood as making representations as to the character, extent or value of the mortgaged property, nor as to the title thereto, nor as to the character or condition of the lien created or imposed by this instrument.

(h) The sworn statement of any person believed by the trustee to be cognizant of the facts, accompanied by the written certificate of the president, vice-president, secretary or treasurer, for the time being, of the party of the first part, to the effect that he believes such statements to be true, may be received by the trustee as sufficient evidence of the payment of taxes or of any facts mentioned in the provisions of this instrument, [62] and shall be a full warrant to the trustee for any action taken by it on the faith thereof.

(i) Any money received by the trustee under any provision of this indenture may be held by it until it is required to pay it out conformably herewith without any liability for interest thereon, except as hereinbefore set forth.

(j) The trustee shall not be chargeable with notice of any default on the part of the party of the first part, except upon delivery to it, the said trustee, of a distinct specification in writing of such default by some person or persons interested in this trust, whose interest, if required, must be proved to the satisfaction of the trustee.

(k) The trustee shall not be personally liable for any debts contracted by it, or for damages to persons

or property involved, or for salaries or nonfulfillment of contracts during any period wherein it, the said trustee, shall manage the trust property or premises as herein provided; nor shall said trustee be liable or responsible for permitting or suffering the said company, its agents or servants, to retain or be in possession of, or manage, conduct or control the property hereby mortgaged, or intended so to be; nor shall said trustee become responsible for any destruction, deterioration, loss, injury or damage which may be done to said property by the said Lumber Company, its servants, or agents, or by any person or persons whomsoever, nor shall the said trustee be held responsible for the consequences of any breach of the said Lumber Company, its agents or servants, of any of the covenants, agreements or obligations herein or in said bonds contained, on the part of said Lumber Company to be kept and performed, nor for or on account of any acts of the said Lumber Company, its agents or servants of any kind, character or nature whatsoever.

ARTICLE XXV. The said S. E. Slade Lumber Company, for itself and its successors and assigns, does further covenant, bargain and agree with the said parties of the second part, their successors and assigns, that at the time of the ensembling and delivery of this instrument, the said S. E. Slade Lumber Company is well seized of the above described real estate in fee simple absolute, and that the same is free and clear of and from all incumbrances whatsoever; and that it will and its successors and assigns shall for-

ever warrant and defend the same against all lawful claims whatsoever. [63]

ARTICLE XXVI. The Lumber Company further agrees and covenants to cause this indenture to be duly and properly filed for record, both as real and chattel security, with all convenient speed.

ARTICLE XXVII. The Lumber Company agrees and covenants that it will at all times, as long as any of the bonds secured hereby are outstanding, give to the trustee and to its agents and representatives, free access to all of the property, books of account and vouchers of the Lumber Company for the purpose of checking the correctness of any statement made by the Lumber Company, or for the purpose of making any investigation desired by the trustee.

And the Lumber Company further covenants and agrees that it will at any time or times, at the request of the trustee, furnish to the trustee, within fifteen days after receipt by it of such request in writing, a statement verified by the oath of its president, secretary or treasurer showing accurately whether any taxes, assessments, rates or charges levied or assessed on the property hereby mortgaged, or any part thereof, or on any interest of the holders of the bonds or coupons hereby secured or any of them, or of the said parties of the second part, are due and unpaid, and if so, as to what property and the reason therefor and the amount thereof, and in similar fashion whether any tax sales have occurred affecting any of the property mortgaged hereby.

ARTICLE XXVIII. In case any of the remedies herein given or attempted to be given the trustee or

the holders of the bonds and coupons secured hereby shall at any time be held invalid, or any provision of this indenture or the bonds or coupons secured hereby shall be held illegal or invalid for any reason, such illegality or invalidity shall not affect the remaining parts of this indenture or of such bonds or coupons, or the other remedies given hereby, but this indenture and said bonds and coupons shall be construed and enforced as if all such illegal or invalid provisions had never been inserted therein. [64]

In case any action is taken, by the parties of the second part or by either of them or by the bond holders in accordance with the terms of this instrument, to enforce the lien hereof or of the bonds and coupons secured hereby against the property hereby mortgaged, such action may be directed against all or any part or parts of the property hereby mortgaged, and no action against part of the property hereby mortgaged shall preclude further action in accordance with the terms hereof against the rest or other parts of such property, nor shall such action under any one of the Articles hereof be taken to preclude or prevent further action under the same or any other Article providing for the enforcement of the lien hereof or of the said bonds and coupons.

ARTICLE XXIX. It is understood and agreed that the word "trustee" as used in this instrument, unless otherwise expressly stated, shall be held and construed to mean Detroit Trust Company, or its successor, as above provided, and shall not include the said Alexander McPherson, or his successors in the trust hereby created, except in cases where the

provisions of Article XIX hereof shall apply, and that the words "parties of the second part" shall be held and construed to mean both parties of the second part and the successor or successors of them or either of them. And that the words "Lumber Company" or the words "party of the first part" shall be held and construed to mean the party of the first part, and its successors and assigns, in like manner and with like effect as if in each case the provisions containing the words "Lumber Company" or the words "party of the first part" had been made expressly to extend to or apply to the successors and assigns of the party of the first part.

In order to facilitate the recording of this instrument it may be executed simultaneously in two counterparts, each of which shall be declared to be an original, and they shall together constitute but one and the same instrument. [65]

For the convenience and at the request of the Lumber Company, this instrument has been duly executed and acknowledged by the parties hereto, or some of them, prior to September first, A. D. 1910, to take effect on September first, A. D. 1910.

IN WITNESS WHEREOF, S. E. Slade Lumber Company, party of the first part, has caused its corporate seal to be hereunto affixed and this instrument to be signed by its president and attested by its secretary for and in its behalf, and said Detroit Trust Company, party of the second part, to evidence its acceptance of the trust hereby created, has caused its corporate seal to be hereunto affixed and this instrument to be signed by its president and at-

tested by its secretary, and the said Alexander McPherson, to evidence his acceptance of the trust hereby created, has signed and sealed this instrument, all as of the first day of September, A. D. 1910.

S. E. SLADE LUMBER COMPANY.

By (Sgd.) S. E. SLADE,
President.

[Corp. Seal] Attest:
(Sgd.) A. H. COLE,
Secretary.

Signed and sealed by S. E. Slade Lumber Company in presence of

(Sgd.) J. B. BRIDGES.
(Sgd.) W. B. MACK.

DETROIT TRUST COMPANY,
By (Sgd.) ALEX. McPHERSON,
President.

[Corp. Seal] Attest:
(Sgd.) RALPH STONE,
Secretary. [66]

Signed and sealed by Detroit Trust Company in presence of

(Sgd.) IRVINE B. VUGER.
(Sgd.) JOHN BALLANTYNE.
(Sgd.) ALEX. McPHERSON. (Seal)

Signed and sealed by Alexander McPherson in presence of

(Sgd.) IRVINE B. VUGER.
(Sgd.) JOHN BALLANTYNE.

State of Washington,
County of Chehalis,—ss.

On this third day of September, A D. 1910, before me personally appeared S. E. Slade and A. H. Cole, to me known to be respectively the president and secretary of S. E. Slade Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of California, and one of the corporations that executed the within and foregoing instrument, and severally acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath severally stated that they were authorized to execute said instrument and that the seal affixed to said instrument and purporting to be the seal of said corporation is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal]

(Sgd.) J. B. BRIDGES,

Notary Public in and for Said State of Washington.

Residence: Aberdeen. [67]

State of Washington,
County of Chehalis,—ss.

S. E. Slade, being first duly sworn, on oath says: That he is an officer, to wit, the president of S. E. Slade Lumber Company, the corporation named in and which executed the foregoing mortgage; that the

same was and is made in good faith, and without any design to hinder, delay or defraud creditors.

(Sgd.) S. E. SLADE.

Subscribed and sworn to before me this third day of September, A. D. 1910.

[Notarial Seal] (Sgd.) J. B. BRIDGES,
Notary Public in and for Said State of Washington.
Residence: Aberdeen.

State of Washington,
County of Chehalis,—ss.

A. H. Cole, being first duly sworn, on oath says: That he is an officer, to wit, the secretary of S. E. Slade Lumber Company, the corporation named in and which executed the foregoing mortgage; that the same was and is made in good faith, and without any design to hinder, delay or defraud creditors.

(Sgd.) A. H. COLE.

Subscribed and sworn to before me this third day of September, A. D. 1910.

[Notarial Seal] (Sgd.) J. B. BRIDGES,
Notary Public in and for Said State of Washington.
Residence: Aberdeen. [68]

State of Michigan,
County of Wayne,—ss.

On this 23d day of August, A. D. 1910, before me personally appeared Alexander McPherson and Ralph Stone, to me known to be respectively the president and secretary of Detroit Trust Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, and one of the corporations that executed the within and fore-

going instrument, and severally acknowledged the said instrument to be the free act and deed of said corporation, for the uses and purposes therein mentioned, and on oath severally stated that they were authorized to execute said instrument and that the seal affixed to said instrument and purporting to be the seal of said corporation is the corporate seal of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

My commission expires January 17th, 1911.

[Notarial Seal] (Sgd.) W. E. WINCKLER,
Notary Public in and for Said County of Wayne,
State of Michigan. [69]

State of Michigan,
County of Wayne,—ss.

I, W. E. Winckler, a Notary Public in and for said county of Wayne, do hereby certify that on this 23d day of August, A. D. 1910, personally appeared before me Alexander McPherson, to me known to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 23d day of August, A. D. 1910.

[Notarial Seal] (Sgd.) W. E. WINCKLER,
Notary Public in and for Said County of Wayne,
State of Michigan.

My commission expires January 17, 1911.

(Filed Aug. 3, 1916.) [70]

*In the District Court of the United States, for the
Western District of Washington, Southern Divi-
sion.*

IN EQUITY—No. 67—E.

DETROIT TRUST COMPANY and ALEXAN-
DER McPHERSON, as Trustees,
Plaintiffs,
vs.

S. E. SLADE LUMBER COMPANY, WILLIAM
T. CAMERON, CAMERON—HOOVER
LOGGING COMPANY, HUMPTULIPS
LOGGING COMPANY, FIRST FEDERAL
TRUST COMPANY, and MILTON R.
CLARK, Trustees, SLADE—WELLS LOG-
GING COMPANY,
Defendants.

Petition of Detroit Trust Co. et al.

The petition of Detroit Trust Company and Alexander McPherson, as trustees, respectfully shows unto this Honorable Court, as follows:

First. Your petitioners have lately filed their bill of complaint in this court and cause against S. E. Slade Lumber Company, William T. Cameron, Cameron-Hoover Logging Company, Humptulips Logging Company, First Federal Trust Company and Hilton R. Clark, Trustees, Slade-Wells Logging Company, praying among other things for the foreclosure of a certain mortgage or deed of trust heretofore and on September 1st, 1910, made by the above defendant, S. E. Slade Lumber Company, to your

petitioners as trustees, on certain real and personal property situate in the county of Grays Harbor, State of Washington, and more particularly [71] described in said bill of complaint, which mortgage or deed of trust secures first mortgage gold bonds dated September 1st, 1910, to the aggregate principal amount of \$1,000,000, which mortgage or deed of trust is now in default and of which bonds there now remains due and unpaid the aggregate principal amount of \$550,000.

Second. That in said mortgage or deed of trust it was expressly provided, especially in Article 18th thereof, that in case resort should be had to any court to foreclose same, a receiver might be appointed as a matter of course, and the S. E. Slade Lumber Company, the mortgagor therein, expressly assented to such appointment.

Third. That the property included in said mortgage comprises certain timber lands in Township 21 North, Range 9 West of the Willamette Meridian, in the county of Grays Harbor, State of Washington, and all timber standing or lying thereon, and also certain mill property in the city of Aberdeen, in said county, including a sawmill, planing-mill, and all the machinery, fixtures, and equipment therein, docks and wharves, and certain city lots in said city, and certain tide lands under lease from the State of Washington.

Fourth. That the timber lands included in said mortgage are not now being operated or logged in any manner. That the sawmill of the mortgagor defendant is not being operated and has not been

operated for two years.

Fifth. That the mortgagor defendant, as your petitioners are informed and believe, owes in excess of \$1,200,000, including its debt upon the bonds secured by the mortgage or deed of trust made to your petitioners. [72] That said defendant is insolvent in the sense that it is unable to meet its debts as they mature. That it is also insolvent in the sense that its property, if forced to sale at the present time, would not be sufficient to pay its debts. That said defendant has no funds with which to employ men to patrol the timber lands mortgaged to your petitioners and no money with which to properly protect and safeguard said mill property, or to pay the insurance thereon, and no money with which to pay taxes upon any of said property as said taxes accrue. That there are now lying upon the lands mortgaged to your petitioners in the neighborhood of 12,000,000 feet of logs, which are a part of your petitioners' security, and which have been cut and bucked for a considerable period of time, but which the mortgagor defendant has, through lack of funds, been unable to move to market, so that the value of same could be obtained.

Sixth. That the principal security for the payment of the bonds secured by the mortgage or deed of trust described herein is the timber on the lands covered thereby. That said lands when denuded of the timber thereon are of little value. That by reason of its financial condition the mortgagor defendant maintains no fire patrol whatsoever upon said property. That in the immediate vicinity of said

property are logged-over lands and also logging operations conducted by various other parties, which logging operations necessarily increase the danger of fires to the mortgaged property, which danger said mortgagor defendant is entirely unable to counteract by any patrol of its lands. That the Olympic National Forest Reserve, same being lands belonging to the United States, lies closely to the north of the mortgaged lands and that the danger of fire to the timber on [73] said reservation is greatly increased by the absence of a fire patrol upon said mortgaged lands, and by the failure to maintain logging operations thereon.

Seventh. That said mortgage contemplated that the bonds secured thereby should be paid by the payment into a sinking fund provided by said mortgage of the sum of \$3 per thousand feet of stumpage cut or removed from said property. That the mortgagor defendant has never had, and will not in the future have, any resources with which to pay said bonds unless the timber on its lands can be cut and sold, and that it is absolutely necessary that said timber be so cut and removed in order to pay said mortgage debt and also to pay the taxes accruing on said property from time to time, and the other charges incident to holding said property. That in order to maintain said mortgaged property as a going property and to keep same from deteriorating to such an extent as to make it insufficient in value to pay the debts of the mortgagor defendant and to prevent it from going to waste it is absolutely necessary to operate said property and to preserve and

maintain said mill and to keep both the timber property and the mill property in such a condition as to keep its value to the highest possible point. That the operation of said timber lands will not only furnish funds with which to pay taxes and other charges incidental to the holding of the property, but will also furnish considerable amounts of money for application upon the debt secured by the mortgage to your petitioners and will at the same time maintain upon said timber lands a force of men whose activities will include the necessary patrol of said property and its maintenance in good order, and will tend to [74] greatly lessen the danger of fire, not only to this property, and the security afforded thereby, but also to neighboring properties and especially to the United States Forest Reserve above referred to.

Eighth. That in and by said mortgage the rents, tolls, incomes, issues, earnings, and profits accruing from the mortgaged property were pledged in case of default to your petitioners as trustees, as will more fully appear from an examination of said mortgage attached to said bill of complaint.

Ninth. That the defendants to the bill of complaint filed in this cause are numerous and that a considerable period of time is bound to elapse pending the foreclosure of said mortgage. That during said period taxes will from time to time accrue and that your petitioners are fearful that the property will be taken away from them on tax sales unless provision is made by the appointment of a receiver for the protection of said property and for the ob-

taining of funds with which to pay taxes as they accrue. That during said period the mill and dock property and the machinery and equipment located therein and thereon will greatly deteriorate in value and there will be decided waste in regard to said mill and dock properties and said equipment and machinery unless provision is made for the maintenance of same by means of a receiver. That the machinery and equipment of said mill and on said dock is particularly apt to deteriorate in value and to be wasted unless it be properly cared for at all times, which the mortgagor defendant is wholly unable to do. That it is vitally necessary that the security of said mill and dock property be protected from loss by fire by insurance [75] premiums for which insurance said mortgagor defendant is absolutely unable to pay.

Tenth. That your petitioners are advised, and so aver, that if a receiver of said property is appointed by this court, said receiver can enter into a contract for the logging, driving, booming, rafting, towing, and selling of the timber on said property upon terms which, if acceptable to this court, will provide means sufficient not only to pay all taxes and other charges incidental to the holding of this property, but also to furnish considerable sums of money which can periodically be applied to the interest and principal due upon the mortgage to your petitioners.

Eleventh. That the mortgage of your petitioners provides among other things that the mill property covered thereby shall at all times be insured against

loss or damage by fire by a proper amount of insurance. That all reputable companies with which such insurance could be negotiated demand that the insured maintain at all times a force of watchmen upon the property and maintain at all times fires in the boilers connected with the property and maintain a proper sprinkling apparatus in good order. That the mortgagor defendant is entirely unable to furnish the funds with which to procure the requisite amount of insurance or with which to provide the safeguards which insurance companies demand before placing any insurance in force. That therefore it will be impossible to maintain insurance on the said property unless a receiver be appointed and authorized to operate the said properties as prayed for in this petition. That the destruction of said properties by fire would materially impair the security granted to your petitioners and would greatly cripple the mortgagor defendant and impair, if it did not destroy its [76] ability to meet its obligations. That on the last appraisal of the mill properties of the mortgagor defendant by the General Appraisal Company for insurance purposes, said property was appraised at approximately \$400,000.

Twelfth. That there have been built upon the timber lands covered by the mortgage herein referred to a number of skid roads at a considerable cost. That these skid roads are largely constructed of logs which belong to your petitioners. That said skid roads are rapidly deteriorating in value and unless put to use in the near future the logs with which same are constructed will entirely lose their value and it

will become necessary to use an equal amount of new logs to construct new skid roads. That there has been spent on said mortgaged property for improvements to facilitate logging and lumbering same upwards of \$50,000, the value of which improvements will be largely, if not entirely lost to the mortgagor defendant unless said property is operated and the timber thereon cut and removed within the near future.

Thirteen. Your petitioners present to the Court in support of the allegations of this their petition, sundry affidavits, and especially the affidavits of John C. Ainsworth, William J. Patterson, H. D. Langille, Almerion P. Stockwell, and George B. Perry, which affidavits are attached hereto and hereby expressly made a part hereof.

WHEREFORE, your petitioners pray :

First. That upon giving bond in such sum as the court may direct, running to the clerk of this court, with surety approved by him, conditioned for the faithful performance of his duties as such receiver, George L. McPherson, [77] of the city of Portland in the county of Multnomah, State of Oregon, be appointed receiver of the property covered by said mortgage, with full power to hold the same in his possession, custody, or control until the further order of this court, and with further power to take possession, care for, and conserve the properties described in the bill of complaint, and in the mortgage aforesaid, and with further power to manage and operate the properties covered by said mortgage, either by

logging contract or otherwise, as he may deem advisable, and with further power to receive and collect the rents, incomes, issues, earnings, and profits of said mortgaged properties, whether the same are now due or will hereafter become due and payable, and with further power to do such things, enter into such agreements, employ such agents in connection with the management, care, preservation, and operation of said mortgaged properties as he may deem advisable, and to incur such expense and make such disbursements as in his judgment may be advisable or necessary in connection with the care, preservation, operation, and maintenance of said mortgaged properties until the further order of this court, and to disburse the moneys from time to time received from the rents, incomes, issues, earnings, and profits of and from said mortgaged properties and from the operation thereof under the further orders of this court.

Second. That your petitioners may have such other and further relief in the premises as to this court shall seem proper, and your petitioners will ever pray.

DETROIT TRUST COMPANY and ALEX-
ANDER McPHERSON, as Trustees.

By GEORGE B. PERRY,

Their Agent and Attorney.

SNOW, McCAMANT & BRONAUGH,
MILLER, SMITH, CANFIELD, PADDOCK
& PERRY,

Solicitors for Petitioners. [78]

United States of America,
District of Oregon,
County of Multnomah,—ss.

George B. Perry, of Detroit, Michigan, being duly sworn, deposes and says: That he is the agent and attorney of Detroit Trust Company and Alexander McPherson, as trustees, the petitioners named in the above petition. That both of said petitioners are absent from the States of Oregon and Washington and are citizens of the State of Michigan and residents of the city of Detroit in the county of Wayne in said State, and that neither of said petitioners is at the present time either in the State of Oregon or in the State Washington and have no agent or representative in either of said States other than this deponent. That this deponent has investigated the facts connected with the averments of said petition and has had principal charge of all of the proceedings in the cause in which this petition is filed for these petitioners. That such knowledge as the petitioners have of the facts stated herein has been obtained in the main from information gained by this deponent. That deponent has read the above petition by him subscribed as agent and attorney for said petitioners and knows the contents thereof and that the same is true except as to those matters therein stated to be on information and belief and as to those matters he believes it to be true.

GEORGE B. PERRY.

Subscribed and sworn to before me this 2d day of August, A. D. 1916.

EDNA HUBER,
Notary Public for Oregon.

My commission expires the 17th day of June 1920.
[79]

We hereby assent to the prayer of the above petition and consent that this court may make an order based thereon and as prayed for.

S. E. SLADE LUMBER COMPANY,
HUMPTULIPS LOGGING COMPANY,
SLADE-WELLS LOGGING COMPANY,
By BRIDGES & BRUENER,
Their Solicitors.

(Filed Aug. 4, 1916.) [80]

*In the District Court of the United States for the
Western District of Washington, Southern Division.*

IN EQUITY—NO. 67—E.

DETROIT TRUST COMPANY and ALEX-
ANDER McPHERSON, as Trustees,
Plaintiffs,

vs.

S. E. SLADE LUMBER COMPANY, WILLIAM
T. CAMERON, CAMERON-HOOVER LOG-
GING COMPANY, HUMPTULIPS LOG-
GING COMPANY, FIRST FEDERAL
TRUST COMPANY and MILTON R. CLARK,
Trustees, SLADE-WELLS LOGGING COM-
PANY,

Defendants.

Order Appointing Receiver of S. E. Slade Lumber Co.

The above-entitled cause came on to be heard this day upon the plaintiffs' bill and petition for receiver, the prayer of which petition was supported by proofs and by arguments of Wallace McCamant, Esq., solicitor and of counsel for the plaintiffs, and consented to by Theodore B. Bruener, Esq., one of the solicitors for the defendants S. E. Slade Lumber Company, Humptulips Logging Company and Slade-Wells Logging Company; and

WHEREAS, it appears that sufficient cause exists for the appointment of a receiver;

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES IT IS ORDERED, ADJUDGED AND DECREED:

First. That upon giving bond in the sum of \$50,000 running to the clerk of this court, with surety approved by him conditioned for the faithful performance of his duties as such [81] receiver, George L. McPherson be and he hereby is appointed receiver of the real and personal property covered by the mortgage or deed of trust sought to be foreclosed in this proceeding, with full power to hold the same in his possession, custody and control, and to take possession, care for and conserve same, and with full power to manage and operate all or any part of the properties covered by said mortgage or deed of trust, either by logging contract or otherwise, as he may deem advisable, and with full power

to receive and collect the rents, incomes, issues, earnings and profits of said mortgaged properties, whether the same are now due or will hereafter become due and payable, and with full power to do such things, enter into such agreements and employ such agents and attorneys in connection with the management, care, preservation and operation of said mortgaged properties, or any part thereof, as he may deem advisable from time to time, and to incur such expense and make such disbursements from time to time as in his judgment may be advisable or necessary in connection with the care, preservation, operation and maintenance of said mortgaged properties, or any part thereof, and with full power to disburse the moneys from time to time received by him from the rents, incomes, issues, earnings and profits of and from said mortgaged properties, or any part thereof, and from the operation thereof, all until the further order of this court.

Second. That said receiver as soon as possible obtain the necessary information and prepare and submit to the Court for its consideration an inventory of the real and personal property covered by said mortgage or deed of trust and in his possession as such receiver. Said receiver is not to sell or dispose of any of the assets or property in his possession hereunder or make any contract for the logging of the timber lands covered by said mortgage or deed of trust without specific authority or without submitting the proposed logging contract to this Court for its [82] approval.

Third. And said receiver is hereby further authorized to do all things which may be incidental, necessary or convenient for the purpose of carrying into effect the objects of his receivership as hereinbefore set forth, including the employment of competent counsel and attorneys, and he is hereby required to keep a careful account of all moneys received and expenses incurred by him in the premises, and to make report to this Court from time to time of his doings in the premises, and said receiver has leave to apply to this Court at any time hereafter for such further orders or directions as may be necessary.

Dated this 4th day of August, A. D. 1916.

EDWARD E. CUSHMAN,

District Judge.

(Filed August 4, 1916.) [83]

*In the District Court of the United States for the
Western District of Washington, Southern Division.*

No. 67-E.

DETROIT TRUST COMPANY and ALEX-
ANDER McPHERSON, as Trustees,
Plaintiffs,
against

S. E. SLADE LUMBER COMPANY, WILLIAM
T. CAMERON, CAMERON-HOOVER LOG-
GING COMPANY, HUMPTULIPS LOG-
GING COMPANY, FIRST FEDERAL
TRUST COMPANY and MILTON R. CLARK,
Trustees, SLADE-WELLS LOGGING COM-
PANY,

Defendants.

**Petition of Receiver of S. E. Slade Lumber Re Con-
tract with Humptulips Logging Co.**

To the Honorable EDWARD E. CUSHMAN, Judge
of the Above-entitled Court:

The petition of George L. McPherson, the duly ap-
pointed and qualified receiver of the defendant, S. E.
Slade Lumber Company, respectfully recites that
Humptulips Logging Company is willing to enter
into a contract with the receiver in words and figures
as per the proposition hereto annexed, marked Ex-
hibit "A" and made a part of this petition, that your
petitioner has investigated the responsibility of
Humptulips Logging Company, and believes that it
is able to fulfill the obligations assumed by it in ac-

cepting the proposition set forth in Exhibit "A." Your petitioner believes that it is to the interest of the estate that such a contract be consummated,

WHEREFORE YOUR PETITIONER PRAYS, that leave be granted him [84] to enter into such contract with Humptulips Logging Company.

GEORGE L. McPHERSON,
Receiver.

Western District of Washington,
Southern Division,—ss.

I, George L. McPherson being duly sworn do depose and say that I am the petitioner above named, and that the foregoing petition is true as I verily believe.

GEORGE L. McPHERSON.

Subscribed and sworn to before me this fourth day of August, 1916.

FRANK L. CROSBY,
Clerk of the U. S. District Court for the Western
District of Washington, Southern Division.

By F. M. Harshberger,
Deputy.

(Filed August 4, 1916.) [85]

**Exhibit "A" to Petition—Letter to Humptulips
Logging Co. Re Logging Contract.**

Humptulips Logging Company,
Aberdeen, Washington.

Gentlemen:

I make you the following proposition to log the timber lands of the S. E. Slade Lumber Company, in Township 21 North, Range 9 West of Willamette

Meridian, Grays Harbor County, Washington, and to place the logs in the flow of the Humptulips River, and to procure the driving of said logs to the booms at the mouth of said River, and thereafter to procure the rafting and towing of said logs to the various marketing points on Grays Harbor, and to market or sell said logs and account for the proceeds thereof, all as hereinafter provided.

I will grant you the exclusive right to enter upon said lands for the purpose of cutting and removing the timber thereon. . You will forthwith so enter and proceed to place in the flow of said River the felled and bucked logs, now on said lands, and further proceed to log and lumber said lands of all merchantable timber thereon, clean as you go, and cutting timber from such subdivisions as will not in the opinion of receiver, depreciate the value of the remaining timber, and place the logs (except such timber as may be used by you for skid roads and other purposes necessary in the operation) in the flow of the said River as rapidly as possible, all in a thoroughly business-like manner and according to approved logging and lumbering practice, and all to my satisfaction. You are to conduct an operation sufficiently extensive to enable you to place, and by accepting this offer you expressly agree to place at least 50 million feet, board measure, camp scale (by the scale from time to time in use on Grays Harbor) of logs from said lands in the flow of said River in each twelve months the contract continues, such amount to be placed in said River in as near equal quantities as may be in each period of four months. Each log is to be scaled

board measure (by the scale from time to time in use on Grays Harbor) by you before being placed in the flow of said River (this is the scale herein sometimes referred to as "camp scale"). I am to be at liberty at any time to inspect all of your logging and lumbering operations and all of your books and records pertaining to this transaction, and I am to have the right at any time to check any camp scale or selling scale (hereinafter referred to) made by you or to make one of my own, if I so desire. Each log before being placed in the flow of said River is to be branded with distinguishing marks, recorded from time to time in the County Recorder's office at Montesano. Such marks shall show in an appropriate way the section from which the log was cut and the month and year of the cutting. Thus 8-16 would designate a log cut from Section 27 in August, 1916.)2(
)7(

You to procure that all of the logs, after being placed by you in the flow of said River, will at all times be driven to booms controlled by you at the mouth of said River with all possible dispatch and according to approved driving practice, all to my satisfaction, and that insofar as is possible, the logs from said lands, when rafted, will be rafted separate and distinct from all other logs. You will at all times procure that said River is kept in a drivable condition and as free as possible from obstructions to the [86] prompt passage of logs down the booms and at least once in each year you will thoroughly “sack” said River and clean up the logs hung up therein, or on the banks thereof,

You are to market and sell all of said logs cut and removed from said lands at the highest market prices obtainable by you, and to procure the rafting and towing of said logs from the booms to the various marketing or selling points. You to scale the logs at the various marketing or selling points by the scale from time to time in use on Grays Harbor (this is the scale herein sometimes referred to as "selling scale"). You to keep a boom record showing the number of each raft leaving your booms, the number of pieces in each said raft and the marks on each piece. I to have access at all times to all such records and also to the records of the company doing the driving, rafting and towing, showing the number of feet of logs from said lands on which it claims charges and the numbers of the rafts on account of which the charges are made. In case any dispute arises over the selling scale or the grades of any raft between you and any purchaser, I must have the right to approve of the referee to whom the settlement of the dispute is left, if any.

None of the logs from said lands are ever to be sold by you for less than \$4.30 per M feet board measure, selling scale net, (this is after all discounts have been deducted).

You are to sell the logs from said lands only for cash or 90 day paper. Out of the purchase price the purchaser shall remit direct to the company doing the driving, rafting and towing for its charges, which shall be \$1.25 per M. feet on the selling scale for all logs delivered and sold at either Aberdeen or Hoquiam, and \$1.30 per M feet on the selling scale for all

logs delivered and sold at Cosmopolis. We jointly to notify every purchaser of logs on Grays Harbor that every log bearing our distinguishing marks is my property and that settlement therefor is to be made by the purchaser to Hayes & Hayes, Bankers at Aberdeen, Washington. You to see that the balance of the purchase price of any raft of the logs from said lands (after driving, etc., charges have been deducted and paid by the purchaser) if paid in cash or by check or draft, less the cash discount of 2%, is made payable to said Hayes & Hayes, Bankers, and is received by you and by you turned over to said Hayes & Hayes, Bankers, and by them placed in a fund specifically designated to identify it with this contract, and called Humptulips Logging Company, George L. McPherson Receiver Fund, all within two weeks from the date of the delivery of the raft sold to its purchaser. If said balance of the purchase price (not deducting any discount) is paid by 90 day paper, you to see that all such paper is made payable to Hayes & Hayes, Bankers, and that all such paper is received by you and that you procure the discount thereof and the deposit in cash of the face of the paper (less 2% discount) in the specially designated fund in Hayes & Hayes, Bankers, all within two weeks from the date of the delivery of the raft sold to its purchaser. I am not to be asked to accept any 90 day paper or anything other than cash, and I am to be in no way liable on the acceptance or discount of any 90 day paper by you, either for yourself or for any company involved in the performance of this contract. You to guarantee the payment of any

such paper taken by you or by any such company, and you also to guarantee that there shall be deposited in such special fund, in cash, the full purchase price of each raft sold, less the driving, rafting and towing charges and less the 2% discount, within two weeks from the date of the delivery of each such raft.

You are to furnish said Hayes & Hayes, Bankers, and me, forthwith, duplicates of each selling scale sheet. Each such sheet [87] shall show the date of the delivery of the raft sold, its number, the number of thousand feet board measure of each grade of logs in the raft, the prices at which the logs were sold, the distinguishing marks on said logs and the number of thousand feet board measure of each grade of logs in the rafts which did not come from the lands here in question if any such there be.

On or before the tenth day of each month you will furnish said Hayes & Hayes, Bankers, and me a statement showing your actual logging expense per thousand feet board measure, camp scale for the last preceding calendar month. Logging expense will consist of pay-roll of Superintendent and crew, mess house and commissary loss, if any, accounting, right of way charges by others, repair of machinery used upon this work and property and replacement of parts thereof, replacement or purchase of tools or cables used in the operation, construction of dams for landing ponds upon the property, construction of skid roads, telephone expense, operation of Superintendent's auto and of motor truck, construction and upkeep of wagon roads on the property, workmen's compensation insurance and such other charges as

are from time to time properly a part of your logging expense on this particular operation. In this connection it is understood that you will keep an accurate account of your actual logging expense and such account shall at all times be subject to my revision and correction. Also that you will put your present equipment, machinery, tools and cables on the property without cost to me and that no charge will be made against me for the use of same, or for the use of present camps, dams and skid roads, either by way of depreciation or otherwise. Also that you may acquire any rights of way from others necessary for the moving of the logs to the River, subject to my approval.

On or before the fifteenth day of each month you to see that Hayes & Hayes, Bankers, distribute so much of the specially designated fund as represents the deposited proceeds of all logs sold and delivered during the preceding calendar month in the following order of priority:

First. Pay me \$3.00 per M feet on the basis of the selling scale referred to.

Second. Pay you \$3.60 per M feet on the basis of said selling scale, on account of your actual logging expense per M camp scale for that month, or such proportion of said amount per M feet selling scale as the balance remaining to be distributed for that month will pay.

Third. Pay you any balance up to \$1.00 per M feet, for all logs sold and delivered during that month on the basis of said selling scale.

Fourth. Pay me any balance.

All withdrawals from the fund shall be made on the joint order of Humptulips Logging Company and George L. McPherson, Receiver.

Before the 20th day of each 5th month hereafter we to determine your actual average logging expense per M feet board measure camp scale, for the period of the four calendar months immediately [88] preceding. This figure when arrived at, we shall certify to said Hayes & Hayes, Bankers, and such certificate shall state the months for which the actual average logging expense have been so determined and the actual amount of money which you have been overpaid or underpaid on account of your actual logging expense for the four calendar months immediately preceding on logs cut, sold and delivered during that period. If you have been overpaid, you shall forthwith pay me the amount of such overpayment and in default thereof same shall be deducted from the next monthly payment payable to you as herein provided. If you have been *been* underpaid I shall forthwith pay you any balance due you thereon, provided I have received sufficient moneys therefor during said four months period under item Fourth above, for logs cut, sold and delivered by you during said period but not otherwise. Each such four months settlement btween us as successively made shall constitute a full, complete and final settlement for that entire period. Thereafter the actual average logging expense for that period as so ascertained shall be substituted for the figure \$3.60 in the Second item above as to any logs sold and delivered which were cut in that period and as to any such logs

you shall be paid each month such part of such actual average logging expense as the moneys distributable that month under the Second item per M feet on the basis of the selling scale will pay and no more. And in no event shall you receive in all on account of your actual average logging expense over any four months period more than your actual total logging expense for such period as shown by your statements approved by me.

For all of their services under this agreement, you are to see that Hayes & Hayes, Bankers, make no charge to me and that they make remittances to me in New York or Chicago exchange at par, if so requested.

The payments herein provided to be made to you or to other companies connected with the performance of this undertaking from time to time, comprise all of the payments to be made to you, or to any other company so connected for the full and complete performance of your undertakings hereunder.

Should I at any time so desire, I may request you to hold a certain amount of logs in your booms for a certain period, provided I make arrangements therefor satisfactory to you, and in case I am able at any time to sell any of the logs on the property before they are put in the flow of the river, at a price which will return to me at least \$3.00 per M feet board measure, net, together with a sum of money sufficient to pay your logging expense thereon and your \$1.00 profit, I reserve the right to sell any of such logs upon paying you such logging expense and such profit thereon, but in no instance shall this be done unless I

have in hand from the purchaser of any such logs, a sum of money sufficient to pay me at least my \$3.00 and you your logging expense and profit thereon.

You are to account to me from time time as this contract progresses for the number of thousand feet of logs board measure, taken from said property, according to the camp scale, but in any such accounting, if there is any discrepancy, I am to take into consideration and give you the benefit of the opportunity for clerical mistakes on the part of your scalers and of the over-scaling occasioned by the rivalry between different logging crews and of the difference in scale which might naturally exist between a camp scale and a selling scale. [89]

This agreement shall continue in full force and effect until the above described lands have been completely logged and lumbered, but it may be cancelled by either party hereto at any time, for any reason satisfactory to the party cancelling, upon 60 days (by this is meant days in which work can be done) written notice of such cancellation to the other party. In the event of any such cancellation. I am to be at liberty to notify you to forthwith stop all possible logging expense of every kind and to bend your entire energies to drawing into the flow of the River all felled timber in the woods and to so clear up your operations as to minimize the danger of fire. In case of any such cancellation by either party, we shall forthwith attempt to arrive at a full, complete and final settlement of all matters between us on account of this contract, but if no such settlement can be arrived at, then it is understood that while further

logging operations shall cease, you are still obligated to drive the logs in the flow of the River to the booms and to raft, tow and sell the same, if I so desire, and account for all the proceeds all in the manner provided for herein, and in no event shall any cancellation operate to take from you the right to get your driving, rafting and towing charges and your logging expense and your \$1.00 out of said logs, if same can be obtained by you out of the sale of said logs, after the payment of the \$3.00 per M, all as provided for herein.

In case I cancel this contract for any reason other than your failure to perform the same in accordance with its terms, I agree to pay you your actual expense in moving your equipment into the green timber, not to exceed \$1.000

Nothing contained in this agreement shall be construed as in any way changing the ownership of any of the logs referred to herein from the S. E. Slade Lumber Company, or from me as its Receiver, until any such logs are sold and delivered to their respective purchasers for a price sufficient to return to me at least \$3.00 per thousand feet board measure, on the basis of the selling scale, which sum of money must be ensured to me before any payment is made on account of any lien or claim for driving, rafting and towing charges, and which sum of money must be paid to me in every instance before any payment is made to you on account of your logging expense or your profit.

In accepting this contract, it is understood that you agree that if property covered hereby is sold, you will

sell your complete logging and lumbering outfit upon the property, including all equipment, machinery, camps, tools and cables, and all your interest in landing ponds, skid roads and rights of way upon the property, to the purchaser for \$50,000 cash, provided that request for same is made to you either by me or S. E. Slade Lumber Company within thirty days of the sale.

Your acceptance of this offer will constitute the contract between us.

Yours truly,

_____. [90]

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

No. 67—E.

DETROIT TRUST COMPANY and ALEX-
ANDER McPHERSON, as Trustees,
Plaintiffs,

against

S. E. SLADE LUMBER COMPANY, WILLIAM
T. CAMERON, CAMERON-HOOVER LOG-
GING COMPANY, HUMPTULIPS LOG-
GING COMPANY, FIRST FEDERAL
TRUST COMPANY and MILTON R.
CLARK TRUSTEES, SLADE-WELLS
LOGGING COMPANY,

Defendants.

**Order Authorizing Receiver of S. E. Slade Lumber
Co to Enter into Contract with Humptulips
Logging Co.**

On reading and filing the petition of George L. McPherson, receiver of S. E. Slade Lumber Company, on the terms provided in the draft of a proposition therefor attached to said petition and on hearing Wallace McCamant, Esq., attorney for said receiver in support therefor it is now here ordered that said receiver be and he hereby is authorized to enter into a logging contract with Humptulips Logging Company on the terms contained in said proposition.

EDWARD E. CUSHMAN,

Judge.

Dated August fourth, 1916.

(Filed August 4, 1916.) [91]

*In the District Court of the United States for
the Western District of Washington, Southern
Division.*

IN EQUITY—No. 67.

DETROIT TRUST COMPANY and ALEXAN-
DER McPHERSON, as Trustees,
Plaintiffs,

vs.

S. E. SLADE LUMBER COMPANY, WILLIAM
T. CAMERON, CAMERON-HOOVER
LOGGING COMPANY, HUMPTULIPS
LOGGING COMPANY, FIRST FEDERAL

TRUST COMPANY and MILTON R.
CLARK, Trustees, SLADE-WELLS LOG-
GING COMPANY,

Defendants.

**Petition of the First National Bank of San Francisco
et al.**

To the Honorable Judges of the Above-named Court :

Come now The First National Bank of San Francisco, the Coats-Fordney Logging Company and the Saginaw Timber Company, and allege that they are creditors of the defendant S. E. Slade Lumber Company in the following amounts, to wit: The First National Bank of San Francisco in the sum of \$231,150, the Coats-Fordney Logging Company in the sum of \$40,714.02, and the Saginaw Timber Company in the sum of \$9,747.20, which sums are secured by a certain mortgage or trust deed executed by the S. E. Slade Lumber Company to the First Federal Trust Company and Milton R. Clark, trustees, covering the premises described in plaintiffs' complaint and in the mortgage, a copy of which is attached thereto, and executed and recorded subsequent to the plaintiffs, Detroit Trust Company and Alexander McPherson, trustees.

That the said First Federal Trust Company and Milton R. [92] Clark, Trustees, as aforesaid, are, under the said terms of mortgage or trust deed, under no obligation to perform any duty thereunder unless requested so to do in writing by the duly appointed representatives of The First National Bank of San Francisco, the American National Bank of San Francisco, and Welch & Company, respectively,

and have not appeared in or taken any action in the premises; and your petitioners aver that the said American National Bank of San Francisco and Welch & Company, by their respective representatives, have joined in a request for the appointment of a receiver herein with power to operate and refused to join with your petitioners herein or to request the said trustee to act in the premises herein.

That for the protection and preservation of the rights and interest of your petitioners herein, they respectfully petition this Court as follows:

1.

That so much of the order made and entered in this cause on the 4th day of August, 1916, appointing George L. McPherson as receiver of all the property and assets of the S. E. Slade Lumber Company, as purports to authorize and empower the said receiver to carry on and operate the properties of the defendant S. E. Slade Lumber Company, be vacated and set aside, for the reasons and upon the grounds following, to wit:

First. That the properties of said mortgagor defendant consist of a large mill plant and a large amount of timber lands, and under its charter powers it is authorized to carry on and operate said mill property and carry on and conduct the business of logging said timberlands; that your petitioners aver that for more than one year said properties have been idle and said defendant S. E. Slade Lumber Company has not conducted or carried on the business aforesaid, or any part thereof. [93]

Second. That this Court is without authority or

power to authorize its receiver of an insolvent corporation to begin and carry on the business authorized to be conducted by such corporation when the same is not, at the time of the appointment of such receiver, being carried on or conducted by such insolvent corporation.

Third. That it has not been made to appear and it is contrary to the fact that it is necessary for the full preservation of the entire assets of said insolvent corporation that the authorized business of such corporation be carried on by said receiver.

Fourth. That it will be necessary to make extensive repairs and provide large equipment to enable said receiver to begin and carry on the business of said insolvent corporation, a business which it was compelled to abandon because it was unprofitable.

Fifth. That the nature and character of the business of said insolvent corporation, for which it was created and which it was authorized to conduct under its charter, and the nature and character of the properties owned and formerly operated by it are such that the operation thereof by the receiver would not only involve a large expenditure of money, but would likewise necessarily involve the long continuance of said receivership, and thus interfere with and prevent the speedy determination of this cause and the judicial disposal of the assets of the said insolvent defendant for the payment of its creditors.

II.

That the *ex parte* order made and entered in this cause on the 4th day of August, 1916, immediately upon the appointment of said receiver, which pur-

ports to authorize said receiver to enter into a contract with the Humptulips Logging Company for the logging of all the timberlands covered and described in the mortgages given by the defendant S. E. Slade Lumber Company to the plaintiffs herein and to the said First [94] Federal Trust Company and Milton R. Clark, Trustees as aforesaid, a copy of which proposed contract is set forth in the petition upon which said order is based, be vacated and set at naught, and that any contract made by the receiver in pursuance thereof be cancelled and rescinded, for the reasons and upon the grounds following, to wit:

First. That the making and performance of said contract will involve the continuance of said receivership over a long period of time, to wit, approximately ten years, and will necessarily prevent the speedy determination of this cause, and that it is, therefore, unauthorized and void.

Second. That if said receiver is permitted to make and carry out said contract, it will result in the gradual conversion and disposal of the timber which constitutes nearly the whole of the valuable assets of the defendant S. E. Slade Lumber Company, which will be converted and disposed of over a long period of time for the benefit of plaintiffs and the parties to said contract, and will prevent the winding up of the affairs of said insolvent corporation and the conversion of its assets into money by the ordinary judicial processes of the Court herein.

Third. That under the terms of said proposed

contract, the assets of said corporation and the disposition thereof will be withdrawn from the immediate supervision and control of the Court, and undue and unrestricted authority and power over said assets will be invested in said receiver.

Fourth. That the terms and provisions of said contract are reckless and improvident, as appears upon the face thereof, and in this, that it in fact authorizes and permits certain undue and unreasonable profits and gains to the said Humptulips Logging Company; all as will more fully be made to appear upon the hearing hereof. [95]

Fifth. That the said Humptulips Logging Company and the officers and stockholders thereof are so related to and identified with the defendant S. E. Slade Lumber Company that the same is an unfit and improper party to invest with the authority and power conferred by said proposed contract to log and dispose of all the timber covered by said mortgages in the manner and upon the terms and conditions as set forth in said proposed contract.

And your petitioners pray that an order be entered herein directing said receiver to appear before this Court, at a time to be fixed by it, and show cause why this petition be not granted, and that at such hearing these petitioners be permitted to intro-

duce proofs in support hereof, both orally and by affidavit.

THE FIRST NATIONAL BANK OF SAN
FRANCISCO.

By HUGHES, McMICKEN, DOVELL &
RAMSEY,

Its Solicitors.

COATS-FORDNEY LOGGING COMPANY.
SAGINAW TIMBER COMPANY.

By JOHN C. HOGAN,
Their Solicitor.

United States of America,
Western District of Washington,—ss.

E. C. Hughes, being first duly sworn, on oath deposes and says: That he is one of the solicitors for the First National Bank of San Francisco, a corporation, one of the petitioners named in the foregoing petition; that he makes this affidavit [96] in verification of the said petition on behalf of said petitioners, for the reason that there is no officer or agent of any of said petitioners within said district; that he has read said petition, knows the contents thereof, and believes the same to be true.

E. C. HUGHES.

Subscribed and sworn to before me this 14 day of August, A. D. 1916.

[Notary Seal] JOHN P. GARVIN,
Notary Public in and for the State of Washington,
residing at Seattle.

(Filed August 14, 1916.) [97]

*In the District Court of the United States, Western
District of Washington, Southern Division.*

No. 67—E.

DETROIT TRUST COMPANY and ALEXAN-
DER McPHERSON, as Trustees,
Plaintiffs,

vs.

S. E. SLADE LUMBER COMPANY, WILLIAM
T. CAMERON, CAMERON—HOOVER
LOGGING COMPANY, HUMPTULIPS
LOGGING COMPANY, FIRST FEDERAL
TRUST COMPANY and MILTON R.
CLARK, Trustees, SLADE—WELLS LOG-
GING COMPANY,

Defendants.

Memorandum Decision.

Filed August 28, 1915.

CUSHMAN, District Judge.

While the full authority of a court equity should be sparingly exercised, it is considered that, in a proper case, its power is sufficient to support the order attached by the petition of certain of the creditors of the S. E. Slade Lumber Company, secured under the third mortgage.

The further question raised by the petition is the propriety of such an order. Under the contract made by the receiver with the Humptulips Logging Company, any risk of loss to those interested in the property appears much less than it would be under any other arrangement. It further appears that there

is substantial danger of the security becoming inadequate unless the course adopted is pursued, and it appears that, under present conditions, a forced sale of the property would result in a sacrifice of much of its real value. This is not only shown by the affidavits [98] which have been filed, but by the conduct of the parties in interest.

If there is ought to shock the conscience, or anything to prejudice the interest of those secured under the third mortgage, it is inconceivable that the majority in number and amount of those secured, would petition—as they have done—to the Court for the order already made. Such creditors have had, in all respects, as good an opportunity to know the circumstances and prospects as the objecting creditors and, owing to the nearer residence of the consenting creditors to the property involved, in many respects, they are in a better position to know the conditions than certain of the objecting creditors.

The petition to vacate the order will be denied; but it will be modified in the following respects:

The receiver will not undertake to operate the property without the further order of the Court, except to the extent necessarily incident to the supervision of the logging contract made with the Humptulips Logging Company;

The orders and contract shall be without prejudice to the right of any party interested to seek to establish—should he hereafter see fit so to do—the ownership of the Humptulips Logging Company by the defendant, the S. E. Slade

Lumber Company, or any interest therein less than ownership.

Owing to the fact that the interests of all parties require the speediest possible settlement of the questions in dispute, as a condition of the denial of the petition to vacate the order, the receiver and parties other than the objecting creditors are required to stipulate with the latter for the hearing of any appeal from this order to the Court of Appeals at the October term of the present year.

(Filed Aug. 28, 1916.) [99]

*In the District Court of the United States for
the Western District of Washington, Southern
Division.*

No. 67—IN EQUITY.

DETROIT TRUST COMPANY and ALEXAN-
DER McPHERSON, as Trustees,

Plaintiffs,

vs.

S. E. SLADE LUMBER COMPANY et al.,

Defendants.

**Order Granting Leave to Petitioners to Intervene,
etc.**

The First National Bank of San Francisco, the Coats-Fordney Logging Company and the Saginaw Timber Company, petitioners herein, having presented their petition for leave to amend their original petition herein and for a rehearing thereof, said petitioners appearing by their solicitors, E. C. Hughes and John C. Hogan, and the defendants, S. E.

Slade Lumber Company and Humptulips Logging Company appearing by their solicitors, Bridges & Bruener, and the plaintiffs and the receiver heretofore appointed herein appearing by their solicitors, Snow, McCamant & Bronaugh;

IT IS HEREBY ORDERED by the Court that said petitioners be and they are hereby granted leave to file their said petition as intervenors herein, and that a rehearing of their said petition, as amended, be had at a time to be hereafter fixed by this Court.

Done in open court this 21st day of October, 1916.

EDWARD E. CUSHMAN,
Judge.

(Filed October 21, 1916.) [100]

*In the District Court of the United States for
the Western District of Washington, Southern
Division.*

IN EQUITY—No. 67.

DETROIT TRUST COMPANY and ALEXAN-
DER McPHERSON, as Trustees,
Plaintiffs,

vs.

S. E. SLADE LUMBER COMPANY, WILLIAM
T. CAMERON, CAMERON - HOOVER
LOGGING COMPANY, HUMPTULIPS
LOGGING COMPANY, FIRST FEDERAL
TRUST COMPANY and MILTON R.
CLARK, Trustees, SLADE-WELLS LOG-
GING COMPANY,

Defendants.

**Petition for Leave to Amend the Original Petition
Herein and for a Rehearing Thereof.**

To the Honorable Judges of the Above-named Court:

Come now the First National Bank of San Francisco, the Coats-Fordney Logging Company and the Saginaw Timber Company, and respectfully petition the Court for leave to amend the original petition herein, by adding thereto the following:

That the *ex parte* order heretofore made in this cause appointing Geo. L. McPherson as receiver of the mortgaged premises described in the complaint of the plaintiff on file in this cause, be vacated on the following grounds:

1st. That the said mortgage security is more than adequate to satisfy the indebtedness to plaintiffs secured thereby.

2d. That it does not appear that the property covered by said mortgage is in danger of being lost, removed or materially injured, so as to render said security inadequate for the discharge of the indebtedness to the said plaintiff.

And your petitioners further pray the Court that a rehearing of said Petition as herein amended be granted to your petitioners, with leave to file further affidavits herein, and that [101] the time and place

be fixed for the hearing thereof.

THE FIRST NATIONAL BANK OF SAN
FRANCISCO.

By HUGHES, McMICKEN, DOVELL &
RAMSEY,

Its Solicitors.

COATS-FORDNEY LOGGING COMPANY.
SAGINAW TIMBER COMPANY.

By JOHN C. HOGAN,

Their Solicitors.

(Filed October 16, 1916.) [102]

*In the District Court of the United States for
the Western District of Washington, Southern
Division.*

No. 67—E.

DETROIT TRUST COMPANY and ALEXAN-
DER McPHERSON, as Trustees,

Plaintiffs,

vs.

S. E. SLADE LUMBER COMPANY, WILLIAM
T. CAMERON, CAMERON-HOOVER
LOGGING COMPANY, HUMPTULIPS
LOGGING COMPANY, FIRST FEDERAL
TRUST COMPANY and MILTON R.
CLARK, Trustees, SLADE-WELLS LOG-
GING COMPANY,

Defendants.

**Answer of the American National Bank of San
Francisco et al.**

Come now the American National Bank of San Francisco, a corporation, Welch & Company, a corporation, United States National Bank of Portland, Oregon, a corporation, Slade-Wells Logging Company, a corporation, and Humptulips Logging Company, a corporation, and respectively showing to the Court as follows:

I.

That answering defendants are creditors of S. E. Slade Lumber Company, a corporation, and beneficiaries secured under that certain mortgage or deed of trust made on the 2d day of June, 1915, between S. E. Slade Lumber Company, a corporation, as mortgagor, and First Federal Trust Company of San Francisco and Milton R. Clark, as trustees, as mortgagees; that said answering defendants represent a majority both in number and in amount of claims secured under said mortgage or deed of trust above described.

II.

That on the 30th day of April, 1915, a certain [103] agreement, otherwise known as creditors' agreement, was entered into by and between answering defendants and the First National Bank of San Francisco, a corporation, Coats-Fordney Logging Company, a corporation, Saginaw Timber Company, a corporation, and Sudden Estate Company, a corporation, which said agreement was entered into for the purpose of protecting and securing the claims

of the unsecured creditors of S. E. Slade Lumber Company, and with the purpose of committing the signers of said agreement to the advancement, for a period of one year and optionally for two years, of sufficient moneys to pay the interest on the bonds secured under and by virtue of the first mortgage covering the lands of the S. E. Slade Lumber Company, as well as the interest on the second mortgage, the taxes on the property of the Lumber Company and the insurance thereon, upon condition that Detroit Trust Company and Alexander McPherson, as trustees, the mortgagees under the first mortgage, would waive the collection for the period of one year after the signing of said agreement, and provisionally for a period of two years, of the principal of the maturing bonds under said first mortgage. That under said creditors' agreement it was contemplated that a third mortgage should be made by S. E. Slade Lumber Company to First Federal Trust Company, a corporation, as trustee, covering the properties of the Lumber Company described in the first and second mortgages, including other property, which mortgage was duly given and is the same mortgage or deed of trust hereinabove referred to. That under the terms of said creditors agreement, the creditors parties thereto duly advanced the moneys therein contemplated to be advanced, and during said period of one year earnest attempts were made by said creditors, represented by a committee, and the said S. E. Slade Lumber Company to sell the timber holdings of the Lumber Company for a price sufficient to pay the claims of the first, second and

third mortgagees, but without [104] success. That said creditors agreement constituted the working agreement under which the beneficiaries secured under the third mortgage were to be governed, and under said creditors' agreement the creditors parties thereto agreed to be represented by a committee consisting of George A. Kennedy, representing the First National Bank of San Francisco, P. E. Bowles, representing the American National Bank of San Francisco, and A. P. Welch, representing Welch & Company, and it was provided in said agreement that said committee, representing all the creditors, should have power only to act unanimously and not by a majority. That after the expiration of one year from the signing of said creditors' agreement, certain of the creditors refused to advance further moneys in fulfillment of the purposes of the creditors' agreement, and thereupon it was sought to enter into a logging contract for the timber holdings of the lumber company, by and with the consent of Detroit Trust Company and S. E. Slade Lumber Company and the unanimous consent of the creditors' committee above mentioned. That the creditors' committee could not agree upon the policy of logging said timber, P. E. Bowles and A. P. Welch, a majority of said creditors' committee, being in favor of such policy, and George A. Kennedy, the remaining member of the committee, being opposed thereto. That under said creditors' agreement said committee of creditors could in their discretion cause suit to be brought or other appropriate proceedings commenced to foreclose the mortgage to be given by

the Lumber Company, and which is the same mortgage or deed of trust made on the 2d day of June, A. D. 1915, above referred to, and under the terms of said mortgage or deed of trust it is provided that the parties of the second part (being the trustees) shall be under no obligation or duty to perform any act thereunder, unless requested in writing so to do by duly appointed representatives of The First National Bank of San Francisco, The American National Bank of San Francisco and Welch & Company. It is further provided [105] in said mortgage or deed of trust that the trustees should have the exclusive right of action thereunder and that no beneficiary under said mortgage should be entitled to commence any action unless the trustees should refuse or fail so to do when properly thereunto requested. True and correct copies of said creditors' agreement and of said mortgage or deed of trust have heretofore been offered in evidence in this court and cause and reference thereto is hereby made. That the trustees under said mortgage or deed of trust heretofore and to wit, on the 14th day of June, 1916, were duly notified by P. E. Bowles and A. P. Welch, a majority of the members of the creditors' committee created under the agreement of April 30, 1915, not to take any action whatsoever at the time of the date of such notification or at any time in the future, under the third mortgage or otherwise, until the unanimous consent of the creditors' committee could be obtained, and answering defendants allege that said unanimous consent has not been obtained, and said trustees under the mortgage or deed of trust have never

been requested in writing by said committee, acting in harmony, to do or perform any act or take any steps whatsoever under the third mortgage or otherwise, and said trustees have never been requested in writing by said creditors' committee to take any action or proceeding in the pending cause. That by reason of the terms of the creditors agreement and the mortgage or deed of trust of June 2, 1915, and by reason of the failure of the creditors' committee to demand of the said trustees to take any action or proceeding in the pending cause, answering defendants claim and insist that First National Bank of San Francisco, Coats-Fordney Logging Company and Saginaw Timber Company, or either of them, have no right to appear and contest the order of the Court made herein, appointing a receiver and authorizing the making of a logging contract and approving of such logging contract, and answering defendants except to so much of order of the Court made and entered on the [106] — day of December, 1916, authorizing and permitting each and every one of the beneficiaries under said mortgage and deed of trust to intervene herein and to become parties defendant herein.

III.

Answering defendants further respectively submit that if the beneficiaries under the third mortgage are proper parties defendant herein, either under the order of the Court heretofore entered or otherwise, and have a right to appear herein, either jointly or severally, either to contest the action of the Court in appointing a receiver and authorizing him to enter into a logging contract and approving the making of

a logging contract, or of appearing and approving the action of the Court in such particulars, then answering defendants respectively pray that the order of the Court made on the 4th day of August, 1916, appointing George L. McPherson as receiver of all the property and assets of S. E. Slade Lumber Company, a corporation, with power to operate the properties of the S. E. Slade Lumber Company, and the order of the Court made on the 4th day of August, 1916, authorizing the receiver to make and enter into a certain logging contract with Humptulips Logging Company, a corporation, and approving said logging contract, be continued in force, upon the following grounds and reasons, to wit:

A. Because of a forced sale of the lands of the S. E. Slade Lumber Company would result in a sacrifice of much of its real value, and said property if forced to sale at the present time, either under the bill of the plaintiffs in this cause, or otherwise, would not bring sufficient moneys to pay the debts of the S. E. Slade Lumber Company secured under the first, second and third mortgages, and leave no equity for the said mortgagor.

B. That the properties of the S. E. Slade Lumber Company are more than adequate to the payment of the debts of the said Lumber [107] Company secured under said first, second and third mortgages, with an equity remaining in the mortgagor, provided full value can be secured for said properties and provided said properties are turned from dead into liquid assets; that only by immediate cutting and marketing of the timber can the full value of said timber holdings be secured for the creditors of the

Lumber Company, and only by and through the means of a logging operation can the creditors of the said Lumber Company and more particularly the beneficiaries secured under the third mortgage, obtain the payment of their claims, and by reason thereof it will be for the best interests of all the creditors of the said Lumber Company and more particularly for the interest of all the creditors secured under the third mortgage, that the logging contract entered into by and between the receiver and Humptulips Logging Company be kept in force and carried out.

C. Because there were at the time of the making of the logging contract approximately twelve (12) million feet of fir logs cut and bucked on the lands of the Lumber Company, which logs were in constant danger of being destroyed by fire, and also constituted an extraordinary fire risk with reference to the standing timber, and which logs were of great value and were daily deteriorating in value unless the same were brought to market and sold.

D. Because large sums of money had sometime prior to the making of the logging contract by the receiver, been spent in opening up the property of the Lumber Company for the more advantageous logging of the same, an numerous skid roads had been constructed on the property, and there was on the ground ready for use a large logging equipment of great value and belonging to the Humptulips Logging Company, and which skid roads and logging equipment under the logging contract entered into were immediately available for use in the logging operations; that in order to obtain the advantage of

the skid roads which had been constructed on the property, and in order to [108] obtain the value of the moneys which had theretofore been spent in opening up the lands of the Lumber Company for the logging of the same, it was necessary to take immediate steps to conduct logging operations upon said lands, and unless the logging operations begun by the receiver be continued, the property of the S. E. Slade Lumber Company will so deteriorate in value and the carrying charges of the indebtedness of the Lumber Company will grow so great that the property will be insufficient to pay the debts.

E. Because the S. E. Slade Lumber Company is insolvent and has no money wherewith to pay taxes or insurance and cannot meet any of its mature and maturing obligations, or in *any safeguard* and protect its properties from forest or other fires or from waste and deterioration.

F. Because in the opinion of answering defendants it will not be necessary to pay all the debts of S. E. Slade Lumber Company from the revenues derived from the logging operations now being conducted. That within two or three years from the date of the making of said logging contract, providing the same is continued in force and carried out according to its terms, the indebtedness of the defendant S. E. Slade Lumber Company will be so materially reduced and the condition of the Lumber Company so largely improved, that it will be possible to refinance the obligations of the Lumber Company and provide for the liquidation of all its indebtedness. Because in the opinion of answering defendants, within two or three years from the date of the

making said logging contract, providing the same is continued and carried out according to its terms, the logging of said timber will demonstrate the value of the timber holdings of the Lumber Company to such an extent as to make possible the sale of the said [109] properties at a price more than adequate for the payment of the indebtedness of the said Lumber Company.

IV.

In support of its contentions that the orders of the Court appointing a receiver with power to enter into a logging contract and authorizing the particular contract entered into by the receiver, answering defendants adopt and refer to the testimony heretofore introduced in this cause by the plaintiff, the receiver and by Humptulips Logging Company.

WHEREFORE, your answering defendants pray for the continuance of the receivership and the continuance of the logging contract entered into by the receiver, under the authority and approval of the Court, and for such other and further relief as in equity and good conscience they may be entitled to.

THE AMERICAN NATIONAL BANK OF
SAN FRANCISCO.

WELCH & COMPANY.

UNITED STATES NATIONAL BANK OF
PORTLAND, OREGON.

SLADE-WELLS LOGGING COMPANY.

HUMPTULIPS LOGGING COMPANY.

By THEO. B. BRUENER,

Its Solicitor.

P. O. Address: Aberdeen, Wash.

(Filed December 29, 1916.) [110]

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

No. 67.—IN EQUITY.

DETROIT TRUST COMPANY and ALEXAN-
DER McPHERSON, as Trustees,
Plaintiffs,

vs.

S. E. SLADE LUMBER COMPANY et al.,
Defendants.

THE FIRST NATIONAL BANK OF SAN FRAN-
CISCO, COATS-FORDNEY LOGGING
COMPANY and SAGINAW TIMBER
COMPANY,

Intervenors.

Decretal Order.

This cause came on to be heard on this 18th day of December, A. D. 1916, at this term, upon the petition and amended petition of the First National Bank of San Francisco, Coats-Fordney Logging Company and Saginaw Timber Company, creditors secured under a certain junior mortgage executed by the defendant S. E. Slade Lumber Company to the defendants First Federal Trust Company and Milton R. Clark, as Trustees, which petitioning creditors have heretofore, by order of this Court, been permitted to intervene herein and been made parties to defendant, with authority to act in their own behalf, because of the refusal of the said trustees, First Federal Trust Company and Milton R. Clark, to appear and

act for them herein, and the said cause was duly argued by counsel; and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED and DECREED as follows, namely: [111]

First. That the *ex parte* order made and entered in the above-entitled cause on the 4th day of August, 1916, appointing George L. McPherson as receiver of all the mortgaged premises and property described in the complaint of the plaintiffs herein, be and it is hereby approved and made the final order of this Court appointing said receiver.

Second. That the *ex parte* order made and entered in this cause on the 4th day of August, 1916, authorizing and directing the said George L. McPherson, as such receiver, to enter into a contract with the Humptulips Logging Company for the logging of the timber upon the lands covered and described in the mortgages given by the defendant S. E. Slade Lumber Company to the said plaintiffs herein and to said First Federal Trust Company and Milton R. Clark, Trustees under said junior mortgage, a copy of which said contract is set forth in the petition upon which said order is based, be and it is hereby approved and made the final order of this Court, and that the contract made by the said receiver in pursuance thereof be and it is hereby ratified and approved, and said petition and amended petition of intervening defendants is hereby dismissed.

To each of which orders the said petitioning creditors duly excepted and their exception is hereby allowed.

Done in open court this 18th day of December,
1916.

EDWARD E. CUSHMAN,
Judge.

(Filed December 18, 1916.) [112]

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

No. 67—IN EQUITY.

DETROIT TRUST COMPANY and ALEXAN-
DER McPHERSON, as Trustees,
Plaintiffs,

vs.

S. E. SLADE LUMBER COMPANY et al.,
Defendants,

vs.

THE FIRST NATIONAL BANK OF SAN FRAN-
CISCO, COATS-FORDNEY LOGGING
COMPANY and SAGINAW TIMBER
COMPANY,

Intervenors.

Order Allowing Appeal.

JOURNAL ENTRY.

Now in open court on this 18th day of December,
A. D. 1916, upon the making, signing and entry herein
of the decretal order of this Court this day entered in
said cause, denying the petition of The First National
Bank of San Francisco, Coats-Fordney Logging
Company and Saginaw Timber Company, interven-
ing defendants herein, and ratifying and approv-

ing the orders authorizing the receiver to enter into a contract for logging the mortgaged premises and approving said contract, the said intervening defendants, The First National Bank of San Francisco, Coats-Forney Logging Company and Saginaw Timber Company, give notice of appeal from said decretal order, and the whole and every part thereof, to the United States Circuit Court of Appeals for the Ninth Judicial District, and at the same time present and file herein their assignment of errors, and ask the Court [113] to allow their said appeal and fix the penalty of the cost bond required to be given therein.

Now, therefore, it is by the Court ORDERED that said appeal be and hereby is allowed, and the bond for costs therein be and it is hereby fixed at the sum of \$200.

EDWARD E. CUSHMAN,
U. S. District Judge.

(Filed December 18, 1916.) [114]

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

No. 67—IN EQUITY.

DETROIT TRUST COMPANY and ALEX-
ANDER McPHERSON, as Trustees,
Plaintiffs,

vs.

S. E. SLADE LUMBER COMPANY, et al.,
Defendants,

THE FIRST NATIONAL BANK OF SAN FRANCISCO, COATS-FORDNEY LOGGING COMPANY and SAGINAW TIMBER COMPANY,

Intervenors.

Assignment of Errors.

Now on this 18th day of December, A. D. 1916, come the above-named intervenors, the First National Bank of San Francisco, Coats-Fordney Logging Company and Saginaw Timber Company, and say:

That the decretal order entered in the above-entitled cause on this 18th day of December, 1916, wherein the Court approved and made final the *ex parte* order heretofore entered in said cause on the 4th day of August, 1916, appointing George L. McPherson as receiver of the mortgaged premises described in plaintiffs' complaint, and further approved and made final the *ex parte* order of said Court made on the 4th day of August, 1916, authorizing and directing said George L. McPherson, as such receiver, to enter into a contract with the Humptulips Logging Company for the logging of the timber upon said mortgaged premises, a copy of which contract is set forth in the petition of the receiver upon which said order is [115] based, and denied the petition of these intervening defendants to vacate and set aside the contract made by said receiver in pursuance thereof, is erroneous and unjust to these intervening defendants:

First. Because the said George L. McPherson is not a receiver of an insolvent corporation and of all its assets and property, but is a receiver only

of the mortgaged premises to care for and conserve the same and the rents and profits thereof, pending the foreclosure of the plaintiffs' mortgage, and is without power or authority to carry on or conduct the business of the mortgagor or any part thereof.

Second. Because the Court is without authority or power to authorize its said receiver to enter into a contract by which the carrying on of any part of the business of the mortgagor is delegated to a third party.

Third. Because the Court is without power to authorize the said receiver of the mortgaged premises to cut and remove the standing timber from the mortgaged premises or to cause the same to be sold and disposed of at private sale.

Fourth. Because the Court exceeded and abused its discretionary powers in authorizing and approving the making of said contract by its said receiver.

Fifth. Because the execution and carrying out of said contract would require a period of eight or ten years and would prevent the final hearing and determination of the cause of action instituted by plaintiffs and pending herein and the entry and [116] execution of a final decree therein during said time.

Sixth. Because the carrying out of said receiver's contract divests this proceeding of the ordinary judicial processes of the Court and authorizes the disposition by the receiver, at private sale, of the principal part of the property in the custody of the Court.

Seventh. Because it provides for cutting and sale of the standing timber constituting the chief

value of the land and thereby deprives these intervening defendants of their equity of redemption in said mortgaged premises which is secured to them by the execution and delivery of the mortgage of said S. E. Slade Lumber Company to the First Federal Trust Company and Milton R. Clark, mentioned in the complaint of plaintiffs in the above-entitled cause.

Eighth. Because it impairs and diminishes the value of their equity of redemption in said mortgaged premises which is secured to them by the execution and delivery of the mortgage of said S. E. Slade Lumber Company to the First Federal Trust Company and Milton R. Clark, mentioned in the complaint of plaintiffs in the above-entitled cause.

JOHN C. HOGAN and

HUGHES, McMICKEN, DOVELL &
RAMSEY,

Solicitors for Said Intervenors.

(Filed December 18, 1916.) [117]

*In the District Court of the United States for the
Western District of Washington, Southern Division.*

No. 67—IN EQUITY.

DETROIT TRUST COMPANY and ALEX-
ANDER McPHERSON, as Trustees,
Plaintiffs,

vs.

S. E. SLADE LUMBER COMPANY, et al.,
Defendants,

THE FIRST NATIONAL BANK OF SAN FRAN-
CISCO, COATS-FORDNEY LOGGING
COMPANY and SAGINAW TIMBER
COMPANY,

Intervenors.

Cost Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, The First National Bank of San Francisco,
a corporation, Coats-Fordney Logging Company,
a corporation, and Saginaw Timber Company, a
corporation, the above named intervenors, as prin-
cipals, and United States Fidelity and Guaranty
Company, a body corporate, duly incorporated
under the laws of the State of Maryland and au-
thorized to transact the business of surety in the
State of Washington, as surety, executing this bond
in behalf of said principals and each of them, are,
jointly and severally, held and firmly bound unto
Detroit Trust Company and Alexander McPherson,
as Trustees, plaintiffs above-named, George L.
McPherson, receiver herein, S. E. Slade Lumber
Company, a corporation, William T. Cameron,
Cameron-Hoover [118] Logging Company, a cor-
poration, Humptulips Logging Company, a corpora-
tion, First Federal Trust Company and Milton
R. Clark, Trustees, and Slade-Wells Logging Com-
pany, a corporation, defendants above named, their
heirs, executors, administrators, successors and as-
signs in the just and full sum of two hundred (200)
dollars, for the payment of which, well and truly
to be made, we bind ourselves and each of us, our

and each of our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of December, A. D., 1916.

THE CONDITION OF THIS OBLIGATION
IS SUCH THAT

WHEREAS, in the above-entitled action, a decretal order was entered on the 18th day of December, A. D. 1916, denying the petition of the First National Bank of San Francisco, Coats-Fordney Logging Company and Saginaw Company, intervening defendants herein, and ratifying and approving the orders authorizing the receiver to enter into a contract for logging the mortgaged premises and approving said contract, and,

WHEREAS, the said intervening defendants, The First National Bank of San Francisco, Coats-Fordney Logging Company and Saginaw Timber Company have appealed from said decretal order and the whole and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit,

NOW, THEREOF, if the said intervening defendants shall prosecute their said appeal to effect and shall answer all damages and costs that may be awarded against them if they shall fail to make good their plea, then the above obligation to be void, other-

wise to remain in full force and effect. [119]

THE FIRST NATIONAL BANK OF SAN
FRANCISCO.

By HUGHES, McMICKEN, DOVELL &
RAMSEY,

Its Solicitors.

COATS-FORDNEY LOGGING COMPANY.
SAGINAW TIMBER COMPANY.

By JOHN C. HOGAN,

Their Solicitor.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY,

[Corporate Seal] By GROVER C. WINN,

Its Attorney in Fact.

The above and foregoing bond and the sufficiency
of the surety thereon approved by me this 18th day
of December, A. D. 1916.

EDWARD E. CUSHMAN,

Judge of said Court.

(Filed December 18, 1916.) [120]

*In the District Court of the United States for
the Western District of Washington, Southern
Division.*

No. 67—IN EQUITY.

DETROIT TRUST COMPANY and ALEXANDER
McPHERSON, as Trustees,

Plaintiffs,

vs.

S. E. SLADE LUMBER COMPANY et al.,
Defendants.

THE FIRST NATIONAL BANK OF SAN FRANCISCO,
COATS - FORDNEY LOGGING
COMPANY, and SAGINAW TIMBER
COMPANY,

Intervenors.

Stipulation Re Statement of Case.

IT IS HEREBY STIPULATED AND AGREED
by and between the appellants and appellees herein,
by their respective attorneys, as follows:

(1) That the statement, including abstract of the evidence, copies of documents and exhibits, attached to this stipulation and filed herewith, shall be deemed and considered as an agreed statement of the case for the purposes of appeal, and that this agreed statement of the case, together with the transcript of the record as covered by stipulation heretofore signed, shall be transmitted to the clerk of the Circuit Court of Appeals, as the record on appeal.

(2) It shall not be necessary for the clerk to copy the statement of the case attached to this stipulation, but the [121] original thereof may be transmitted by the clerk.

Dated this 1st day of January, 1917.

HUGHES, McMICKEN, DOVELL & RAMSEY,

JOHN C. HOGAN,

Attorneys for Appellants.

WALLACE McCAMANT,

BRIDGES & BRUENER,

Attorneys for Appellees.

I, E. E. Cushman, Judge of the above-named court,

before whom the proceedings in the above-entitled action were had, do hereby approve of the foregoing stipulation and the agreed statement of the case attached thereto, and I hereby certify to the case and the correctness thereof, and I hereby approve of the same.

Dated Jany. 2d, 1917.

EDWARD E. CUSHMAN,
Judge.

Filed in the U. S. District Court, Western District of Washington, Southern Division. Jan. 2, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [122]

Agreed Statement of the Case.

No. 67—IN EQUITY.

DETROIT TRUST CO. et al.

vs.

S. E. SLADE LBR. CO. et al.

Statement of Evidence.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Jan. 2, 1917. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [123]

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

No. 67—IN EQUITY.

DETROIT TRUST COMPANY and ALEXANDER
McPHERSON, as Trustees,

Plaintiffs,

vs.

S. E. SLADE LUMBER CO. et al.,

Defendants.

THE FIRST NATIONAL BANK OF SAN FRAN-
CISCO, COATS - FORDNEY LOGGING
COMPANY and SAGINAW TIMBER
COMPANY,

Intervenors.

Statement of Evidence.

Comes now The First National Bank of San Fran-
cisco, Coats-Fordney Logging Company and Saginaw
Timber Company, intervening defendants and ap-
pellants herein and make and lodge in the office of
the clerk of this court the following statement of the
evidence offered and introduced upon the hearing of
said cause, to wit: [124]

1.

A certain mortgage executed by the defendant S.
E. Slade Lumber Company to the Federal Trust Com-
pany and Milton R. Clark, trustees, duly executed on
the 2d day of June, 1915, and recorded in the manner
as provided by law, a true copy of which is hereto
attached and made a part hereof.

2.

A certain creditors' agreement executed on the 30th day of April, 1915, between certain creditors secured under said mortgage last above referred to, a true copy of which creditors' agreement is hereto attached and made a part hereof.

3.

The Lacey cruise, referred to in the mortgage sought to be foreclosed herein, a copy of which mortgage is attached to the bill of complaint of the Detroit Trust Company and Alexander McPherson in this cause, shows the amount of merchantable timber upon said mortgaged premises at the date thereof to have been 652 million feet, and it is shown by the evidence that subsequent thereto and prior to the first day of August, 1914, there had been logged and sold 100 million feet of timber, and that no logging had been done thereafter prior to the appointment of the receiver herein.

4.

At the time of the appointment of the receiver herein, P. E. Bowles and A. P. Welsh, two of the three trustees named in the creditors' agreement herein above mentioned, by telegram to the clerk of the court, requested the appointment of a receiver as prayed for in said petition. [125]

5.

The intervening defendants offered and read in evidence the following affidavits:

Affidavit of Herman Walker.

The affidavit of HERMAN WALKER, which, so far as material, was as follows:

I am a member of the logging firm of Walker Bros., of Hoquiam, Washington, engaged in logging operations on the Humptulips River. We have an annual operation of 10 or 15 million feet of logs. I am acquainted with the timber tract known as the S. E. Slade Lumber Company timber, and in my opinion there is practically no fire risk in connection with this timber. It is situated in the fog belt close to the coast. I would regard the fire risk as one-half of one per cent. The Humptulips Logging Company has never done any logging on the Humptulips River or elsewhere to my knowledge.

Affidavit of A. J. Morley.

The affidavit of A. J. MORLEY, which, so far as material, was as follows:

I am manager of the Saginaw Timber Company, which is a logging corporation and I have been engaged in the logging business in Grays Harbor County and am familiar with logging operations there *in* for the past ten years. I am acquainted with the Slade Lumber Company tract of timber in controversy; and during the time the Warren Company was logging it in 1912-'14, I visited their camps and was over the property to a considerable extent. The timber comprising the S. E. Slade Lumber Company tract is green, standing timber situated not far from the ocean, and in a section where rains and fogs are abundant and regular except in the latter months of summer and early fall, and the danger in this region from fire [126] to green, standing timber is extremely slight. When fire

gets into green timber of the character of this tract it does practically no damage.

I am familiar with the terms of the contract entered into by the receiver with the Humptulips Logging Company in this case. I have gone over this contract and studied it over carefully. If I were a timber owner I would never make such a contract with a logger. I regard this contract as highly detrimental to the interests of the third mortgagees and general creditors of the Slade Lumber Company situated as the Saginaw Timber Company and the Coats-Fordney Logging Company. In my experience in logging operations I have never known a contract of similar terms to be made.

The feature of the contract allowing the Humptulips Logging Company the cost of logging plus \$1 per M feet profits, is unusual, extraordinary, and unreasonable, and a profit of \$1 under such circumstances would be grossly excessive in my belief.

The contract is loose as to what shall constitute logging expenses, and it would seem to be possible under the contract for the logger to build up an extensive and expensive logging plant under the head of logging expenses, to say nothing of the opportunities afforded for the inclusion of improper charges. However bad the judgment of the logger may be in incurring an item of expense of any magnitude, it becomes immaterial to the logger, since the logs must bear the burden. This feature of the contract is rendered still more objectionable by the fact that, the logger, through its boom and driving companies, is receiving \$1.25 per M feet for driving

and booming the logs, and owing to a total lack of [127] proper provisions in the contract, many items of expense (example, overhead) which should be borne wholly or in part by driving and booming, can be thrown wholly into logging expense and the material tendency will be that way.

The interest of the creditors is not adequately protected by a proper provision requiring the logger to remove all timber capable of making saw logs. The expression "all merchantable timber" is a most elastic and uncertain expression.

The lack of any requirement in the contract that the logs shall be graded when scaled and sold, is a vicious feature, for the contract would permit of the sale of logs on "camp run" under scaling conditions resulting in a reduction of the number of M feet, at the expense of a higher price per M feet, thereby giving the operation a fictitious appearance of advantage to the creditors, when in reality it might be otherwise.

The aspect of the contract permitting the logger to throw up the contract on 60 days notice is bad, and no timber owner should make such a contract with a logger. This would enable the logger to cut such of the timber as may be deemed advantageous to log and then throw up the contract, leaving the most expensive and difficult part of the work to be done.

In considering this contract the facts must be taken into account, that if the contract was carried out it will cover a long period of years, and the logging company pays none of the interest charges,

taxes or other carrying charges of the timber, all of which are borne by the creditors, and which if taken into account would reduce the value received by the creditors for stumpage far below the apparent \$3 [128] per thousand mentioned in the contract. The contract, to a great extent, has the result that the logging company may speculate on the future with this large tract of timber tied up. I would consider a sale of the stumpage at the present time for \$2.25 per thousand, payable in cash or interest-bearing securities a better deal for the creditors than this contract, even if the Humptulips Logging Company should live up to it.

Affidavit of Hubert Schafer.

The affidavit of HUBERT SCHAFFER, which, so far as material, was as follows:

I am a practical logger engaged in the logging business in Grays Harbor County and I am a member of the firm of Schafer Bros. Logging Co. of said county; that our firm is logging timber at the rate of 30 million a year, principally fir. I have charge of the sale of logs of our firm to the mills on Grays Harbor at the present time and for about six months last past our firm has had a sales contract with a mill company in Grays Harbor for all our fir logs on what is known as "camp run" or "straight," as it is sometimes called, that is the logs are not graded at all. Under our contract the purchaser was required to take all our fir logs in this way up to July 1, 1916, at \$11 per thousand, and since July 1, 1916, we are being paid \$10,—and we

did sell nearly all our fir logs that way,—for our fir logs under this contract, on a basis of “camp run” or “straight.” Our fir timber from which these logs are cut is good average fir timber. There are three methods in use on Grays Harbor in marketing logs,—one is to sell them “camp run” or “straight” [129] as we are doing with our fir; a second method is grading them into No. 1, No. 2 and No. 3; and the third is to grade them into Grades Nos. 1 and 2. A practice I have known to prevail to some extent on Grays Harbor in the sale of logs also has been to cut the rough and poor logs, which would naturally make No. 3 logs, into higher grade logs by reducing the number of M feet, so that in this way the seller would receive the same amount of money for fewer number of M feet of logs.

The affidavit of G. S. HARRIS, which was in substance the same as the affidavit of Walker.

6.

The following documents were offered and received in evidence.

A written contract between S. E. Slade Lumber Company and Warren Company, executed July 31, 1912, attached to the affidavit of A. J. Morley as Exhibit “A,” a true copy of which is hereto attached and made a part hereof.

A notice of forfeiture by the S. E. Slade Lumber Company to the Warren Company for its failure to comply with the terms of Warren contract, a copy of which is hereto attached and marked Exhibit “B” and made a part hereof.

An assignment of a certain written option dated June 19, 1914, of the Warren Company to the S. E. Slade Lumber Company, assignment and transferring the rights of S. E. Slade Lumber Company therein to H. B. Brown, identified as Exhibit "C," a true copy of which is hereto attached and made a part hereof. [130]

The record of the board of trustees of the Hump-tulips Logging Company, a true copy of which was by agreement of parties and consent of the court substituted for the original and is hereto attached and made a part hereof and marked as Exhibit "D."

A written transfer, dated, July 27, 1914, by the Warren Company to the Humptulips Logging Company, made in pursuance of the exercise of the option above described, a copy of which is hereto attached and made a part hereof and marked Exhibit "E."

A copy of the release and satisfaction by the S. E. Slade Lumber Company to the Warren Company of all obligations arising under the above-described contract of July 31, 1912, which, omitting signatures, was admitted by the appellees to be in all respects a true copy of the original, a copy of the same being hereby attached and made a part of this statement (marked Petitioners' Exhibit "D.")

Affidavit of A. J. Morley.

7.

The intervening defendants also offered and read in evidence the second affidavit of A. J. MORLEY, describing the documents above mentioned, except

the recording of the proceedings of the board of trustees of the Humptulips Logging Company, and containing the following: [131]

The Warren Company commenced logging operations under its contract and continued to log thereunder and make their monthly payments up to the month of April, 1914, and during that interval cut and put into the water approximately 70 million feet of timber, about 50 million of which was marketed and about 20 million of which remains in and on the Humptulips river.

The Warren Company failed to make the monthly payment of \$12,500 due April, 1914, under its contract with the S. E. Slade Lumber Company, and on or about the 26th of May, 1914 the latter company under the provisions of paragraph 9 of its contract with the Warren Company served notice of forfeiture, (a copy of which is attached to this statement).

Thereafter on June 19, 1914, the Warren Company gave to the S. E. Slade Lumber Company a written option (a copy of which is attached to this statement).

Thereafter the S. E. Slade Lumber Company, without any consideration, as affiant is informed and believes, assigned the said option to H. P. Brown, then vice-president of the S. E. Slade Lumber Company, who between the dates of June 19, 1914 and July 27, 1914, interviewed the various general creditors of Warren Company and obtained from them, or a majority of them, an understanding to the effect that such creditors except about \$20,000 of labor

liens, would wait for their pay until the same could be realized out of the sale of the 20 million feet of logs in the Humptulips river above referred to, and thereafter proceeded to incorporate the Humptulips Logging Company. That the incorporators of the Humptulips Logging Company were H. P. Brown, vice-president of the Slade Lumber Company, W. B. Mack, manager of the [132] S. E. Slade Lumber Co., and one C. A. Pitchford, an employee of the S. E. Slade Lumber Co., and that the articles of incorporation of said company were filed July 18, 1914, and its authorized capital was \$100,000.

That the value of the S. E. Slade Lumber Company tract of timber in controversy is materially and seriously influenced and affected by the question of whether or not the parties controlling the timber control also the driving and booming, and the various easements and rights of way, including dams and logging roads conveyed by the Warren Company to the Humptulips Logging Company.

That the mill of the S. E. Slade Lumber Company has been idle for about two years last past. [133]

**Exhibit "A-1"—Agreement, April 30, 1915, Between
The First National Bank of San Francisco, et
al., and Sudden Estate Company, a Corporation.**

THIS AGREEMENT, Made this 30th day of April, 1915, by and between The First National Bank of San Francisco, and American National Bank of San Francisco, corporations organized under the national banking laws of the United States of America, Welch & Company, a corporation organized and existing under and by virtue of the laws of the State of California, Coats-Fordney Logging

Company, a corporation organized under the laws of the State of Michigan, Saginaw Timber Company, a corporation organized under the laws of the State of Michigan, Slade-Wells Logging Company, a corporation organized under the laws of the State of California, United States National Bank of Portland, a corporation organized under the national banking laws of the United States of America, Humptulips Logging Company, a corporation organized under the laws of the State of Washington, and Sudden Estate Company, a corporation organized under the laws of the State of California.

WITNESSETH: That the parties hereto are creditors of the S. E. Slade Lumber Company, hereinafter called the Lumber Company, and said Lumber Company represents that it is indebted to the parties hereto in the sum of \$531,272.16, and that it is indebted to other creditors in smaller amounts aggregating \$121,963.27; and that said Lumber Company has at the present time an outstanding bond issue, the principal sum of which is \$550,000, secured by first mortgage upon certain of its property, running to the Detroit Trust Company, Detroit, Michigan, and Alexander McPherson, as trustees, and is also indebted in the further sum of \$69,000, secured by a second mortgage upon its property running to the Detroit Trust Company of Detroit, Michigan.

And said Lumber Company represents that it is without available means with which to meet the payments and obligations required to be made, kept and performed by the terms and conditions of the said two mortgages last referred to, and the said [134] Lumber Company represents that it will require the

sum of \$75,000 during the ensuing twelve months to meet the requirements in said mortgages for the payment of taxes, insurance and interest on bonds, exclusive of the retiring of \$50,000 of the principal sum of the bond issue secured by said first mortgage, and also to meet certain expenses incident to taking care of the property with a view to keeping the insurance rates at the lowest practicable figure.

NOW, THEREFORE The parties hereto agree that they will severally advance during the next twelve months upon the conditions hereinafter set forth, the amounts set opposite their respective names, to be loaned to the S. E. Slade Lumber Company for the payment of taxes, insurance and interest on bonds, and the expenses of taking care of the property of the said company for the purpose of keeping the insurance premiums at the lowest practicable figure, viz.:

Names	Amounts
The First National Bank of San Francisco	\$28,650.00
American National Bank of San Francisco	13,425.00
Welch & Company	14,100.00
Coats-Fordney Logging Company	5,025.00
Saginaw Timber Company	1,200.00
Slade-Wells Logging Company	4,575.00
United States National Bank of Portland	3,525.00
Humptulips Logging Company.....	975.00
Sudden Estate Company	3,525.00
	<hr/>
	\$75,000.00

The conditions upon which said advances are to be made are as follows:

First. Said moneys shall be advanced in the amounts and at the times to be fixed by George A. Kennedy, representing The First National Bank of San Francisco, P. E. Bowles, representing The American National Bank of San Francisco, and A. P. Welch, representing Welch & Company.

Second. Such moneys shall be paid by the respective parties hereto to the first Federal Trust Company of San Francisco, to be disbursed by such company as hereinafter provided. [135]

Third. The Lumber Company shall execute its promissory note, payable to each of the respective parties hereto for the amount advanced by it, and shall deliver said note to such Trust Company to be by it delivered to the payee upon the payment by the payee of the amount of such note to such Trust Company. Said notes shall be payable one day after date, and shall bear interest at the rate of six (6) per cent per annum, and shall be secured by the mortgage hereinafter referred to, and payment of the same shall be enforced at the same time and in the same manner as payment of the other indebtedness of said Lumber Company held by the parties hereto.

Fourth. That said Lumber Company, by and with the consent of the Detroit Trust Company of Detroit, Michigan, execute and deliver to the First Federal Trust Company of San Francisco, a mortgage covering all of its property, real and personal, to secure the indebtedness of the several parties

hereto, and also the indebtedness due to the other creditors hereinbefore referred to and also to secure such sums as may be advanced by any of the respective parties hereto under the terms of this agreement, such mortgage to be in form satisfactory to said George A. Kennedy and P. E. Bowles and A. P. Welch, and subject only to the mortgage to the Detroit Trust Company and Alexander McPherson and said second mortgage to the Detroit Trust Company hereinbefore referred to.

Fifth. That there be delivered to such Trust Company eight thousand (8000) shares of the capital stock of said Lumber Company as further security for the payment of the indebtedness to be secured by said mortgage, such stock to be placed in the name of such person or corporation, as pledgee or trustee, as may be designated by said George A. Kennedy, P. E. Bowles and A. P. Welch, and, at the discretion of said last-named parties, to be voted by such trustee or pledgee.

Sixth. That arrangements satisfactory to said George A. Kennedy, P. E. Bowles and A. P. Welch be made by the said [136] Lumber Company with the Detroit Trust Company to have the bonds now due or falling due during the next twelve months carried without commencing proceedings to foreclose the mortgage securing the same, said Detroit Trust Company to agree that no proceedings for foreclosure of either the first mortgage or second mortgage held by it shall be begun during that period. Said Detroit Trust Company likewise to agree to carry the bonds falling due during the fur-

ther period of twelve additional months thereafter, and likewise that no foreclosure proceedings shall be begun during such further period provided that the interest upon said bonds and insurance and taxes upon the property covered by the mortgages held by said Detroit Trust Company are kept paid during such additional twelve months.

Seventh. That all of the unsecured creditors of said Lumber Company not parties to this agreement make, execute and deliver to said First Federal Trust Company assignments of their demands against said Lumber Company in form satisfactory to said George A. Kennedy, P. E. Bowles and A. P. Welch together with authorization to said last-named parties to cause said Trust Company to forbear bringing any suit or action upon such claims against the Lumber Company during the period of two years from the date hereof, or during such lesser period during which the parties hereto may provide for the payment of the taxes, insurance and interest as aforesaid, and with authority to said Trust Company to commence suit upon such claims when so directed by said George A. Kennedy, P. E. Bowles and A. P. Welch.

Said Lumber Company shall place in the hands of said George A. Kennedy, P. E. Bowles and A. P. Welch a statement showing the amount due from it to each of its creditors, with a written admission by each creditor that no more than such amount is due to it.

Eighth. That the Lumber Company shall waive the benefit of all Statutes of Limitations to the satis-

faction of said George A. Kennedy, P. E. Bowles and A. P. Welch, during the period for [137] which the creditors agree to forbear bringing suits upon their demands.

Ninth. That all moneys advanced by the parties hereto shall be paid out by the said First Federal Trust Company directly for the purposes for which such moneys are to be loaned, to wit, the payment of taxes, insurance, interest on bonds, and other expenses as hereinbefore set forth.

Tenth. So many of the directors of said Lumber Company as may be required by the said George A. Kennedy P. E. Bowles and A. P. Welch to place their resignations in the hands of said three persons last named, so that their successors may be elected, whenever the said three persons last named may desire.

Eleventh. Any advances that may be made pursuant to the provisions of this agreement to be first repaid to the parties advancing the same before any of the other moneys owing by said Lumber Company except those secured by the said mortgages to the Detroit Trust Company, shall be paid.

Twelfth. It is understood that one of the smaller creditors of the Lumber Company lives in New Zealand, and in the discretion of said George A. Kennedy, P. E. Bowles and A. P. Welch, this agreement may be declared operative without securing his consent, the Lumber Company assuming the responsibility, however, of obtaining his consent thereto.

The said George A. Kennedy, P. E. Bowles and A. P. Welch, their successor or successors, shall have

power only to act unanimously and not by a majority.

This agreement may be executed in separate copies by the several parties hereto.

The said George A. Kennedy, P. E. Bowles and A. P. Welch may in their discretion, and at the expense of said Lumber Company, have made a complete audit of the affairs of said Lumber Company, and if upon the information disclosed by such audit, or upon other information satisfactory to them, they are satisfied that [138] the condition of said Lumber Company is as represented in this agreement, then they shall, when the same has been signed by all of the parties, and the signed copies have been delivered to said three persons in this paragraph named, declare this agreement operative by a writing mailed to each of the signers thereof.

In the event of the resignation, removal or death of the representative of either of the parties hereto in Paragraph First named, a new representative may be appointed by such party, by written notice served upon the remaining representatives. Any of such parties may, by written notice likewise served upon the remaining representatives, remove its representative at any time, and wherever the said George A. Kennedy, P. E. Bowles and A. P. Welch are herein referred to, the said names shall be taken to include and apply to any successor or successors of said person or persons appointed as herein provided.

It is understood that the undersigned shall not bring any suit or action upon their claims against the Lumber Company during such period for which

they may provide the additional moneys to be loaned to said Lumber Company as aforesaid, provided, however, that said George A. Kennedy, P. E. Bowles and A. P. Welch may in their discretion at any time cause suit to be brought or other appropriate proceedings commenced to foreclose the mortgage or mortgages to be given by said Lumber Company to secure the indebtedness of the parties hereto and the other creditors hereinbefore referred to, and to that end the parties hereto agree to assign their demands against said Lumber Company to said Trust Company when called upon by said last named parties so to do.

This agreement is made for the benefit of the parties hereto only, and not for the benefit of others.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their respective officers thereunto duly authorized, and their respective corporate seals to be affixed, the day and year first above written. [139]

Exhibit "A-2"—Contract Between S. E. Slade Lumber Co. and First Federal Trust Company of San Francisco.

THIS INDENTURE, made as of the 2d day of June, A. D. 1915, between S. E. Slade Lumber Company, a corporation incorporated under and by virtue of the laws of the State of California and having its principal office for the conduct of its business in the city and county of San Francisco, in said State, (and being duly authorized to do business in the State of Washington), party of the first part (hereinafter called "mortgagor"), and First Federal

Trust Company of San Francisco, a corporation incorporated under and by virtue of the laws of the State of California, and having its principal office for the conduct of its business in the city and county of San Francisco, in said State, and Milton R. Clark of said city and county of San Francisco as trustee, parties of the second part (hereinafter called "mortgagees").

WITNESSETH: That in consideration of the sum of twenty-five thousand dollars (\$25,000) loaned to the mortgagor by The First National Bank of San Francisco, a national banking corporation, The American National Bank of San Francisco, a national banking corporation, Welch and Company a corporation organized and existing under the laws of the State of California, Coats-Fordney Logging Company, a corporation organized and existing under the laws of the State of Washington, Saginaw Timber Company, a corporation organized and existing under the laws of the State of Washington Slade-Wells Logging Company, a corporation organized and existing under the laws of the State of California, United States National Bank of Portland, Oregon, a corporation organized under the national banking laws of the United States, Humptulips Logging Company, a corporation organized and existing under the laws of the State of Washington, and Sudden Estate Company, a corporation organized and existing under the laws of the State of California, in the proportions and evidenced by the promissory notes of the Mortgagor as hereinafter described; and in consideration [140] of such further sums of

money as may be advanced to or for the account of the mortgagor by the said nine corporations last above mentioned or any of them, as hereinafter in this instrument mentioned; and in consideration of the indebtedness of the mortgagor S. E. Slade Lumber company to various corporations and individuals as hereinafter mentioned and described amounting to the sum of five hundred eighty thousand, nine hundred forty-three and 79/100 dollars (\$580,943.79), said mortgagor, S. E. Slade Lumber Company has granted, bargained, sold and conveyed and by these present does grant, bargain, sell and convey, unto the mortgagees, First Federal Trust Company of San Francisco, and Milton R. Clark, Trustees, their successors and assigns, all of the following described real and personal property, situate in the county of Chehalis State of Washington, viz:

First. All of the lands, waterfront, timber and other property hereinafter described, together with all the buildings, structures and improvements of every kind and character that are now, or may hereafter be placed upon said lands, and all the rights, ways, privileges, servitudes, appurtenances and prescriptions thereto belonging or in anywise appertaining, and especially including all lumber mills and lumber mill plants, saw-mills, planing-mills, machine-shops, sheds, pump-houses, blacksmith-shops, bars, oil-houses, boilers, engines, pumps, machinery, sprinkler systems, fire apparatus, kilns, power-houses, tools, fixtures, furniture, appliances, shafting, conveyors, electric apparatus, office buildings, logging-roads, tramways, railways and appurte-

nances, rolling stock, locomotives and cars, loaders, rails, ties, stations, platforms, lumber and logging camps and equipments, mill sites and lumber-yards, booms, dwelling-houses, wharves and planking, patterns, boats, tanks, burners, horses, trucks and wagons, and the entire plants and equipments and all improvements or additions, now or that hereafter may be erected or located on any of said lands or premises, or which are or may hereafter be connected with, appertaining to, or used in connection with the same, now owned or hereafter acquired, and all substitutions, replacements or renewals or additions to said lands, premises and property, or any part thereof, and all lands and other property which may be added thereto, and all the timber and other forest products on said lands and premises, or any of them, or that hereafter may be thereon; and all personal property whether enumerated hereinbefore or not, now owned, or which shall be hereafter acquired by the Lumber Company, which [141] shall be situated upon the real property hereinafter described, or which shall be used in connection with any enterprise which shall be located thereon, excepting all logs, lumber, and kindred products paid for, in booms or on mill premises.

A particular description of said lands and premises is as follows:

All those certain pieces or parcels of land situated in the County of Chehalis, State of Washington, known and described as follows:

Lots one (1), two (2), three (3) and four (4) in Block "C"; Lots one (1), two (2), three (3) and four (4)

in Block "D"; all of Blocks "F," "G," and "H"; Lot one (1) in Block fourteen (14); Lots one (1), two (2), three (3), four (4), five (5) and six (6), in Block fifteen (15); Lots one (1), two (2), three (3), four (4), five (5), six (6), ten (10), eleven (11) and twelve (12) in Block sixteen (16); Lots one (1) to twelve (12), both inclusive, in Block seventeen (17); Lots three (3), four (4), five (5), six (6), nine (9) and ten (10) in Block eighteen (18); Lot twelve (12) in Block twenty-five (25); Lots eight (8), nine (9), ten (10), eleven (11) and twelve (12), in Block twenty-six (26); Chehalis Street South of the south line extended of the alley in Block fifteen (15); Newell Street South of the south line extended of the alley in Blocks fifteen (15) and sixteen (16); Harbor Street south of Grant (now Heron) Street; Kansas Street south of the south line extended of the alley in Block seventeen (17); Kansas Street between Lot four (4) in Block "D" and Lot twelve (12) in Block twenty-five (25); the alley in Block "D"; Summit Street west of the east line of Lot twelve (12), Block twenty-five (25) extended north to Lot one (1) in Block "C"; Harbor Street north of the north line extended of the alley in Block twenty-six (26); the unnamed street lying between Blocks fifteen (15), sixteen (16) and seventeen (17) on the north, and Blocks "G" and "H" on the south; all in Samuel Benn's original plat of the town (now city) of Aberdeen, County of Chehalis, State of Washington; said plat being recorded in the office of the Auditor of said County of Chehalis, in Book (1) of Plats, page thirty-nine (39).

Lot (1), Tract twenty-five (25), and all of Tract thirteen (13), Aberdeen Tide Lands; all of the above in Lot two (2), Section nine (9), Township seventeen (17), north of Range nine (9) west of the Willamette Meridian, in Chehalis County, State of Washington.

Also Lots one (1), two (2), three (3), four (4) and five (5) in Block "D"; and Lots one (1), two (2), three (3), four (4), five (5) and six (6) in Block "E," in South Aberdeen; Lewis Street [142] north of the south line of Blocks "D" and "E," South Aberdeen; all in Johnston's Plat of South Aberdeen, recorded in the office of the auditor of said County of Chehalis, in Book one (1) of Plats, page one hundred twenty-five (125); Lots two (2) and three (3) in Tract Eleven (11), Aberdeen Tide Lands; all of the above in Lot eight (8), Section nine (9); and Lot six (6), Section ten (10), Township seventeen (17) north, Range nine (9) west, Willamette Meridian; also the south half of the southeast quarter (S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$) of Section eleven (11); the northeast quarter (N. E. $\frac{1}{4}$), and the south half (S. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$), and an undivided one-half interest in the southeast quarter (S. E. $\frac{1}{4}$) of Section fourteen (14); also the south half (S. $\frac{1}{2}$) of Section fifteen (15); the northeast quarter (N. E. $\frac{1}{4}$), the east half of the northwest quarter (E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$), and the south half (S. $\frac{1}{2}$) of Section twenty-one (21); all of Section twenty-two (22); the east half of the northeast quarter (E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$), and the northwest quarter (N. W. $\frac{1}{4}$) of Section twenty-three (23); all of Sec-

tions twenty-seven (27) and twenty-eight (28); the southeast quarter of the northwest quarter (S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$), the northeast quarter of the southwest quarter (N. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$) of Section thirty-four southwest quarter (S. $\frac{1}{2}$ of S. W. $\frac{1}{4}$), and the east half of Section thirty-two (32); all of Section thirty-three (33); the northeast quarter and the southwest quarter (N. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$) of Section thirty-four (34); all in Township twenty-one (21), north of Range nine (9) west, Willamette Meridian; also the leasehold interest held under and by virtue of a lease from the State of Washington to said S. E. SLADE LUMBER COMPANY dated March 10, 1910, and recorded May 17, 1910, in the office of the Auditor of said County of Chehalis, in Book twenty-nine (29) of Miscellaneous Records, page five hundred fifty-two (552), in and to part of Harbor area in front of the following described property, viz.: Lots two (2) and three (3), Tract eleven (11), and Tract thirteen (13), Aberdeen Tide and Shore Lands more particularly described as follows: All harbor area lying in front of Lots two (2) and three (3), Tract eleven (11), Aberdeen Tide and Shore Lands, and bounded by the inner and outer harbor lines and the northeasterly line of Lot two (2), and the southwesterly line of Lot three (3) produced across the harbor reserve to the outer harbor line; also all harbor area lying in front of Tract thirteen (13), Aberdeen Tide and Shore Lands and bounded on the northwesterly side by the inner harbor line, and on the southeasterly side by the outer harbor line, and on the southwesterly side by a line drawn from angle point number eleven (11) on

the outer harbor line to angle point number eleven (11) on the inner harbor line, and on the east side by the east line of said Tract thirteen (13) produced across the harbor reserve to the outer harbor line, all as shown on official maps of Aberdeen [143] Tide and Shore Lands on file in the office of the Commissioner of Public Lands at Olympia, Washington; all situate and being in the County of Chehalis, State of Washington; excepting existing rights of way, property and appurtenances of Railroad and Railway Companies, also excepting all public roads and such mineral claims and rights of way for ditches and canals and other rights as are reserved by the United States in its patents to the respective lands.

Second. Also all of Lots 4, 5, 6, and south half of Lot 1, and all of Lot 4, Plat of North Aberdeen, now a part of the city of Aberdeen, County of Chehalis, State of Washington.

Also all Section 5, Township 18, north Range 6 west, Willamette Meridian. All Section 8, Township 18, north Range 6 west. All Section 9, Township 18, north Range 6 west. All Section 17, Township 18, north Range 6 west. All Section 18, Township 18, north Range 6 west. The east $\frac{1}{2}$ of Section 7, Township 18, north Range 6 west. The northeast $\frac{1}{4}$ of southwest $\frac{1}{4}$ of Section 7, Township 18, north Range 6 west. Lots 3 and 4 Section 7, Township 18, north Range 6 west. Southeast $\frac{1}{4}$ of southwest $\frac{1}{4}$ of Section 7, north Range 6 west. Southeast $\frac{1}{4}$ of northeast $\frac{1}{4}$ of Section 20, Township 18, north Range 6 west. Northeast $\frac{1}{4}$ of southeast $\frac{1}{4}$ of Section 20, Township 18, north Range 6 west, Southeast $\frac{1}{4}$ of

southeast $\frac{1}{4}$ of Section 29, Township 18, north Range 6 west. Southeast $\frac{1}{4}$ of Section 15, Township 19, north Range 9 west.

Together with the rents, issues and profits on all of said property.

All of said property in paragraph first, above described is now subject to the lien of a certain mortgage made by mortgagor herein to Detroit Trust Company and Alexander McPherson, as Trustees, on September 1st, 1910, and filed for record in the county auditor's office of Chehalis County, State of Washington, on September 3, 1910, and recorded in book forty-three (43) of Records of Mortgages on pages four hundred and thirty (430) et seq., and also filed as a chattel mortgage in said county auditor's office on September 3, 1910, and also a second mortgage made by said mortgagor running to Detroit Trust Company, a corporation under the laws of the State of Michigan, as mortgagee, to secure the payment of a note dated March 1, [144] 1915, calling for the payment of sixty-nine thousand dollars (\$69,000) with interest at six per cent (6%) per annum;

This conveyance is intended as a mortgage to secure the due payment both principal and interest of the indebtedness of the mortgagor herein described and such further sums as may be advanced to or for the benefit of the mortgagor as herein provided, together with interest thereon and also to secure the due performance of all the covenants, agreements and conditions on the part of the mortgagor to be performed, as herein provided and the lien of this mortgage shall secure the payment of the said indebted-

ness in the following order, to wit:

First. The payment of the following described promissory notes executed by the S. E. Slade Lumber Company to the corporations, and in the amounts hereinafter set forth, each bearing date the 2d day of June, 1915, and payable thirty days after its date and bearing interest at the rate of six (6) per cent per annum from the date thereof, to wit:

- To The First National Bank of San Francisco, a national banking corporation,
in the sum of\$9,550.—
- To American National Bank of San Francisco, a national banking corporation.. 4,475.—
- To Welch and Company, a corporation organized and existing under the laws of the State of California..... 4,700.—
- To Coats-Fordney Logging Company, a corporation organized and existing under the laws of the State of Washington 1,675.—
- To Saginaw Timber Company, a corporation organized and existing under the laws of the State of Washington..... 400.—
- To Slade-Wells Logging Company, a corporation organized and existing under the laws of the State of California.... 1,525.—
- To United States National Bank of Portland, Oregon, a corporation organized under the national banking laws of the United States 1,175.—
- To Humptulips Logging Company, a corporation organized and existing under the laws of the State of Washington... 325.—

To Sudden Estate Company, a corporation
 organized and existing under the laws
 of the State of California..... 1,175.—

[145]

And the payment of said sums and each thereof, together with interest thereon, but without any preference, one over the others, shall constitute a charge or lien upon the property hereby mortgaged prior and paramount to any of the other obligations, principal or interest, hereby secured;

Second. The payment of such further advances as may be made by said The First National Bank of San Francisco, a national banking corporation, The American National Bank of San Francisco, a national banking corporation, Welch and Company, a corporation organized and existing under the laws of the State of California, Coats-Fordney Logging Company, a corporation organized and existing under the laws of the State of Washington, Saginaw Timber Company, a corporation organized and existing under the laws of the State of Washington, Slade-Wells Logging Company, a corporation organized and existing under the laws of the State of California, United States National Bank of Portland, Oregon, a corporation organized under the national banking laws of the United States, Humptulips Logging Company, a corporation organized and existing under the laws of the State of Washington, and Sudden Estate Company, a corporation organized and existing under the laws of the State of California, or either or any of them, to the said First Federal Trust Company of San Francisco for the benefit of said mort-

gagor, within two (2) years from and after date hereof, the principal sum of all such advances not to exceed the aggregate of one hundred twenty-five thousand dollars (\$125,000). Said advances may be evidenced by the promissory note or notes of the mortgagor payable to each of said respective parties for the amount advanced by it, said notes to be payable one (1) day after date and to bear interest at the rate of six per cent (6%) per annum, payable monthly, and to be delivered to the respective payees upon the payment by such payee of the amount of said note to said First Federal Trust Company, to be expended by said First Federal Trust Company for the benefit of said mortgagor. Such advances [146] may be made either before or after default of said mortgagor in any of the terms hereof. Each and every such advance is to be in all respects secured by these presents as fully to all intents and purposes as if the obligation or note evidencing the same were described and set forth at large herein; but nothing herein contained shall impair the right of any of said parties advancing said money to collect any sum so advanced, although such advance be made without receipt by the party so advancing the same of a note or notes evidencing the same, and all such advances, however evidenced, shall be in all respects secured by these presents. It is expressly understood and agreed that such advances are to be made only at the election of the respective parties making the same.

All such advances to the amount of not exceeding one hundred twenty-five thousand dollars (\$125,000) and interest thereon shall constitute, next after the

said nine promissory notes hereinbefore described amounting to twenty-five thousand dollars (\$25,000), a charge or lien upon the property hereby mortgaged prior to and paramount to any of the other obligations, principal or interest hereby secured;

Third. The payment without any preference one over the other to the following named corporations and individuals of the indebtedness owing by the mortgagor to such corporations and individuals as follows, viz.:

To The First National Bank of San Francisco, a national banking corporation, the sum of two hundred and two thousand five hundred dollars (\$202,500) represented by the promissory note of the mortgagor dated August 24, 1914, payable one day after date and bearing interest at the rate of six per cent (6%) per annum, the interest thereon having been paid to and including the 31st day of March, A. D. 1915.

To The American National Bank of San Francisco, a national banking corporation, the sum of ninety-five thousand dollars (\$95,000) represented by ten (10) promissory [147] notes of the mortgagor for ten thousand dollars (\$10,000) each, all dated October 23, 1914, payable on demand and bearing interest at the rate of seven per cent (7%) per annum; there has been paid and credited upon the principal sum of one of said promissory notes the sum of five thousand dollars (\$5,000); interest upon all of said notes has been paid to and including the 31st day of March, A. D. 1915.

To Welch and Company, a corporation organized

and existing under the laws of the State of California, the sum of one hundred thousand dollars (\$100,000), represented by the promissory note of the mortgagor, dated March 3, 1914, payable on demand and bearing interest at the rate of eight per cent (8%) per annum, the interest thereon having been paid to and including the 28th day of February, A. D. 1915.

To Coats-Fordney Logging Company, a corporation organized and existing under the laws of the State of Washington, the sum of thirty-five thousand six hundred eighty-nine and 02/100 dollars (\$35,689.02), represented by thirteen (13) drafts of the mortgagor drawn upon itself to the order of said Coats-Fordney Logging Company. The dates of said drafts, the amounts thereof and the dates when the same are payable, are as follows, to wit:

One draft dated April 16, 1915, payable sixty (60) days after date, for twelve hundred eighty and 37/100 dollars (\$1,280.37);

One draft, dated April 19, 1915, payable sixty (60) days after date, for three thousand three hundred twenty-nine dollars (\$3,329);

One draft, dated April 19, 1915, payable sixty (60) days after date, for three thousand one hundred seventy-one dollars (\$3,171);

One draft, dated April 20, 1915, payable sixty (60) days after date, for seven thousand six hundred thirty-nine and 84/100 dollars (\$7,639.84); [148]

One draft, dated April 23, 1915, payable sixty (60) days after date, for three thousand three hundred nineteen and 13/100 dollars (\$3,319.13);

One draft, dated April 23, 1915, payable sixty (60)

days after date, for two thousand seven hundred eighty-seven and 50/100 dollars (\$2,787.50);

One draft, dated May 3, 1915, payable six (6) months after date, for two thousand two hundred four dollars (\$2,204);

One draft, dated May 3, 1915, payable six (6) months after date, for three thousand one hundred ninety-nine and 89/100 dollars (\$3,199.89);

One draft, dated May 17, 1915, payable six (6) months after date, for seven hundred six and 50/100 dollars (\$706.50);

One draft, dated May 17, 1915, payable six (6) months after date, for four thousand five hundred seventy-one and 88/100 dollars (\$4,571.88);

One draft, dated May 17, 1915, payable six (6) months after date, for one thousand two hundred ninety-three and 06/100 dollars (\$1,293.06);

One draft, dated May 23, 1915, payable six (6) months after date, for six hundred seventy-six and 98/100 dollars (\$676.98];

One draft, dated May 26, 1915, payable six (6) months after date, for one thousand five hundred nine and 87/100 dollars (\$1,509.87).

The mortgagor has promised to pay interest upon the principal sum of each of said drafts at the rate of eight (8) per cent per year from and including the date of said respective drafts. No part of said interest has been paid.

To Saginaw Timber Company, a corporation organized and existing under the laws of the State of Washington, the sum of eight thousand five hundred forty-seven and 20/100 dollars (\$8,547.20), repre-

sented by two promissory notes of the mortgagor as follows, to wit: [149]

One note, dated March 15, 1915, for five thousand six hundred one and 40/100 dollars (\$5,601.40), payable ninety (90) days after date, and bearing interest at the rate of eight (8) per cent per annum, from its date;

One note, dated March 18, 1915, for two thousand nine hundred forty-five and 80/100 dollars (\$2,945.80), payable ninety (90) days after date, and bearing interest at the rate of eight (8) per cent per annum, from its date.

To Slade-Wells Logging Company, a corporation organized and existing under the laws of the State of California, the sum of thirty-one thousand five hundred twenty and 84/100 dollars (\$31,520.84), represented by the promissory note of the mortgagor, dated April 12, 1915, payable on demand and bearing interest at the rate of eight (8) per cent per annum, no interest having been paid thereon.

To United States National Bank of Portland, Oregon, a corporation organized under the national banking laws of the United States, the sum of twenty-five thousand dollars (\$25,000), represented by three (3) drafts of the mortgagor drawn upon itself to the order of said United States National Bank of Portland, Oregon. The dates of said drafts, the amounts thereof and the dates when the same are payable, are as follows, to wit:

One draft, dated March 7, 1915, payable sixty (60) days after date for ten thousand dollars (\$10,000), and bearing interest at the rate of seven (7) per cent

per year from said 6th day of May, 1915.

One draft, dated March 21, 1915, payable May 20, 1915, for ten thousand dollars (\$10,000), and bearing interest at the rate of seven (7) per cent per year from said 20th day of May, 1915.

One draft, dated April 21, 1915, payable June 20, 1915, for five thousand dollars (\$5,000), and bearing interest at the rate of seven (7) per cent per year from said 21st day of April, 1915, no part of said interest having been paid. [150]

To Humptulips Logging Company, a corporation organized and existing under the laws of the State of Washington, the sum of seven thousand fifteen and 10/100 dollars (\$7,015.10), represented by two promissory notes of the mortgagor as follows, to wit:

One note, dated May 25, 1915, for three thousand seven hundred thirty-three and 67/100 dollars (\$3,733.67), payable on demand, and bearing interest at the rate of eight (8) per cent per year from the 20th day of March, 1915, no part of said interest having been paid.

One note, dated May 25, 1915, for three thousand two hundred eighty-one and 43/100 dollars (\$3,281.43), payable on demand, and bearing interest at the rate of eight (8) per cent per year from the 30th day of March, 1915, no part of said interest having been paid.

To Sudden Estate Company, a corporation organized and existing under the laws of the State of California, the sum of twenty-five thousand dollars (\$25,000), represented by the promissory note of the mortgagor, dated March 15, 1913, payable on or be-

fore one year after date, bearing interest at the rate of six (6) per cent per annum, interest thereon having been paid to and including the 16th day of March, A. D. 1915.

To R. J. Lawson, the sum of two thousand dollars (\$2,000), represented by the promissory note of the mortgagor, dated March 26, 1914, payable on demand, and bearing interest at the rate of six (6) per cent per annum; interest thereon having been paid to and including the 25th day of March, A. D. 1915.

To J. I. Brittain, the sum of thirty-five hundred dollars (\$3,500), represented by the promissory note of the mortgagor, dated January 1, 1915, payable on demand, and bearing interest at the rate of six (6) per cent per annum; no interest thereon having been paid.

To Felix Santallier, the sum of five thousand dollars [151] (\$5,000), represented by the promissory note of the mortgagor, dated January 1, 1915, payable on demand, and bearing interest at the rate of six (6) per cent per annum; no interest thereon having been paid.

To Harriet C. Frazer estate, the sum of three thousand eight hundred fifty-two and 99/100 dollars (\$3,852.99), represented by the promissory note of the mortgagor, dated the 15th day of May, 1915, payable on demand, and bearing interest from January 1st, 1915, at the rate of six (6) per cent per annum; no interest thereon having been paid.

To Slade Shipping Company, a corporation organized and existing under the laws of the State of California, the sum of thirty-one thousand eight hun-

dred seventy-four and 22/100 dollars (\$31,874.22), represented by the promissory note of the mortgagor, dated March 18, 1915, for Thirty Thousand Dollars (\$30,000), payable on demand, and bearing interest at the rate of six (6) per cent per annum; no interest thereon having been paid; and by an open book account upon the books of said mortgagor in the amount of One Thousand Eight Hundred Seventy-four and 22/100 Dollars (\$1,874.22).

To Mary I. Slade, the sum of Sixteen Hundred Twenty-four and 83/100 Dollars (\$1,624.83), represented by the promissory note of the mortgagor, dated the 15th day of May, 1915, and bearing interest from January 1st, 1915, at the rate of six (6) per cent per annum; no interest having been paid thereon.

To S. E. Slade, managing owner of the barkentine "Jane L. Stanford," the sum of Two Thousand Eight Hundred Nineteen and 59/100 Dollars (\$2,819.59), represented by an open book account upon the books of said mortgagor.

It is understood and agreed that said mortgagor shall be, and it hereby is, allowed to and including the 30th day of June, 1915, within which to make payment of principal and interest upon the obligations hereby secured including such further advances as [152] may theretofore be made under the provisions hereof; and the mortgagor agrees to pay each and all of said obligations at the time; provided that if such payment is not made of each and all said obligations and demands upon said 30th day of June, 1915, then each and all of said obligations shall forth-

with become due and payable at the option of the mortgagees, and proceedings may be forthwith commenced by the said mortgagees to sell said property as hereinafter provided, but this mortgage shall secure any advances hereafter made to or for the account of said mortgagor as herein mentioned, although the same be made after said 30th day of June, 1915. All such advances shall be evidenced by the promissory note of the mortgagor, payable one (1) day after date of making such advances, and the making of any such advances shall not constitute a waiver of any right then existing in the mortgagees to declare all demands hereby secured to be immediately due and payable, or to foreclose this mortgage.

And the said mortgagor does hereby covenant, promise and agree to pay to the various corporations and individuals hereinbefore mentioned, their successors and assigns, all moneys owing to them and each of them and interest, and all moneys that may be hereafter advanced by any of them pursuant to the terms hereof and interest, secured to be paid as aforesaid.

The mortgagor covenants and agrees that the above-described property and premises are at this date, and shall be kept until this mortgage is fully paid and satisfied, free and clear from all liens and encumbrances whatsoever that shall or may have precedence of this mortgage, except said first and second mortgages above referred to.

The mortgagor covenants and agrees to pay all taxes and assessments, whether general or special,

of whatsoever kind or nature, which shall be levied upon said lands and property, and so much of all taxes and assessments which shall be levied upon or on account of this mortgage, or the indebtedness secured thereby, or upon the interest or estate in said lands and property [153] created or represented by this mortgage, or by said indebtedness, whether levied against the said mortgagor, or otherwise, as together with interest provided for by the said several obligations and this mortgage, shall not exceed interest upon said indebtedness computed at the highest present contract legal rate, in accordance with the laws of the State of Washington, or those of any other State, applicable hereto. And the mortgagor hereby waives any and all claims or right against the mortgagees to any payment or rebate on or offset against the interest and principal of said mortgage due by reason of the payment of any of the aforesaid taxes or assessments.

Should the mortgagor make default in the payment of any of said taxes or assessments, as above covenanted, the mortgagees may (but shall not be required to) pay same, including all such taxes or assessments which appear to be liens upon any of the property hereby mortgaged. The mortgagees may likewise (but shall not be required to) pay off any other charge or demand which is or appears to be a lien upon the mortgaged property. Any sums so paid as in this paragraph provided shall be a further lien on said premises under this mortgage, payable forthwith, with interest at the rate of seven per cent (7%) per annum.

And whereas there are now, or may hereafter be, deposited with Detroit Trust Company, Trustee, policies of insurance on the property of the mortgagor in accordance with the provisions of the first mortgage above referred to, now, therefore, it is agreed that the proceeds of said policies, in excess of the claims of the trustees under said first mortgage and of the mortgagee under said second mortgage, shall be applied by the mortgagor to the payment of the debts hereby secured in the order of their priority, but nothing herein contained shall be construed as making said policies, or any of them, payable to the mortgagee hereunder.

The mortgagor does further covenant and agree, that should any default be made in any of the covenants of this mortgage, [154] the mortgagees may at any time cause the abstract or abstracts of title and the tax histories of the aforesaid mortgaged premises to be certified to date, or may procure new abstracts or tax histories in case none were before furnished, and the moneys paid therefor shall be a lien on said premises added to the amount secured by this mortgage and payable forthwith with interest at seven per cent (7%) per annum.

Should default be made in the payment of taxes or assessments or other charges upon the property hereby conveyed, or should default be made in any of the terms, covenants or conditions hereof on the part of said mortgagor to be performed, or should any action or proceedings of whatever nature be taken by suit or otherwise to foreclose, sell, or realize upon the two prior mortgages herein referred to, or

either thereof, or any bond or obligation secured thereby, or should any suit be commenced against the mortgagor to recover upon any indebtedness claimed to be due from said mortgagor, or should any bankruptcy or insolvency proceedings be commenced by or against said mortgagor, then each and all of the aforesaid principal sums and arrearages of interest, attorney's fees, if any, taxes, assessments and other charges, together with all other sums hereby, including both principal and interest, shall at the option of said mortgagees forthwith become due and payable, anything herein to the contrary notwithstanding, and any action, suit or proceedings whatsoever commenced or taken by the mortgagees to recover on said indebtedness, or any part thereof, or to foreclose, mortgage or sell the property hereby mortgaged shall, without any action on the part of the payees of the several obligations herein referred to or described, or any thereof, be conclusive evidence of the exercise by the mortgagees of the option in this paragraph contained.

If default be made in the payment of any of said sums secured hereby, or any part thereof, either principal or interest, or in the performance by the mortgagor of any other term, covenant or condition hereof on the part of the said mortgagor to be performed, [155] the said mortgagees are hereby empowered and authorized to sell the above-described premises and property, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the moneys arising from such sale to retain and apply the same

as follows: first, to the payment of the costs and expenses of sale, including all costs and attorneys' fees incurred in any action or proceeding brought to foreclose this mortgage or recover said indebtedness; second, to the payment of any taxes, assessments, or charges paid by the mortgagees under the terms hereof; third, to the payment of the full amounts of principal and interest due upon the said promissory notes hereinbefore described, payable to the following corporations, to wit:

To the First National Bank of San Francisco	\$9,550.—
To American National Bank of San Francisco	4,475.—
To Welch and Company	4,700.—
To Coats-Fordney Logging Company	1,675.—
To Saginaw Timber Company	400.—
To Slade-Wells Logging Company	1,525.—
To United States National Bank of Portland, Oregon	1,175.—
To Humptulips Logging Company	325.—
To Sudden Estate Company	1,175.—

fourth, after the full payment of the sums aforesaid, to the payment of both principal and interest of all such sums as shall have been advanced under the provisions hereof, by said nine corporations last above named or any of them; fifth, to the payment both principal and interest of all of the other promissory notes, drafts and demands secured hereby as hereinbefore described, and such other sums as may be due hereunder. The surplus, if any, shall be paid to the party or parties found to be entitled thereto.

Should any action or proceedings be brought to collect on the indebtedness or any part thereof hereby secured, or to foreclose this mortgage, the mortgagees shall be entitled to such attorneys' fees in any such suit, action or proceeding, as the court may judge reasonable, which attorneys' fees shall be allowed and paid [156] whether a judgment be recovered or not; and in such action a receiver may, on application of the plaintiffs therein, be appointed by the Court, without notice, to receive any rents, incomes, issues and profits from the above-described property, or any part of the same, and apply them to the payment of the taxes and assessments which may be due or become due during the pendency of the action, and until sale be finally made; likewise to the costs and commissions of the receiver, and the payment of any deficiency which may remain in the debts secured hereby, after the sale of said property, and the application of the proceeds of the sale to the payment of said debts. Said attorneys' fees, and the costs and commissions of the receiver, shall be a lien on said land and secured by this mortgage.

In any action for the foreclosure of this mortgage, the decree therein shall provide that said premises and property shall be sold, so far as may be, if advisable, as a whole in one piece or parcel, and shall provide for any necessary deficiency decree. It is expressly agreed that the mortgagees shall have the right to foreclose this mortgage and sell the real property hereby conveyed irrespective of the fact that said mortgagees or any creditor secured by this mortgage may have received or may hold any assign-

ment, transfer, pledge of or lien upon personal property by way of security for the payment of any of the indebtedness secured hereby, and without first exhausting or resorting to said personal property, or any thereof. But nothing herein contained shall be construed as preventing any creditor hereby secured, or their assigns, from realizing upon any collateral or other security held by such creditor individually, either before or after the commencement of proceedings to foreclose this mortgage.

It is further understood and agreed that the said mortgage may be foreclosed upon any of the defaults herein mentioned, irrespective of whether the indebtedness herein described, or any part thereof, shall or shall not have been assigned to, or shall [157] be held by, the said First Federal Trust Company, either before or after the execution of this mortgage.

Nothing in this instrument contained shall be construed as in any way limiting the right of the mortgagor to cut or remove timber from the premises and property covered hereby and converting the same to its own use, free and clear of the lien of this instrument, so long as such cutting or removing is done in accordance with the provisions of the first mortgage above referred to, and so long as the mortgagor is not in default in the performance of any of the covenants, stipulations, conditions and agreements on its part to be performed in said first mortgage, or in this mortgage, contained.

In case of the resignation, incapacity or inability to act hereunder of said First Federal Trust Company, it shall be lawful for The First National Bank

of San Francisco, American National Bank of San Francisco and Welch and Company, corporations hereinbefore mentioned herein, to appoint a successor by a writing by representatives of all three said corporations signed.

In case of the resignation, removal, incapacity or inability to act hereunder of the said Milton R. Clark, it shall be lawful for said First Federal Trust Company, or its successor in trust, to appoint some male adult citizen of the United States to act as one of the trustees hereunder in his place.

In case of the resignation, incapacity or inability to act hereunder of said First Federal Trust Company, or its successor, for the time being, and in case no successor has been appointed, and until the appointment of such successor, all the power herein given to said First Federal Trust Company shall for the time being vest in said Milton R. Clark, or his successor in trust, and in case it shall be impossible, or be deemed impossible by said First Federal Trust Company, or its successors, for the time being for it lawfully to do or perform any act or acts necessary or proper for it to do under the terms of this instrument, then and in such case said [158] Milton R. Clark, or his successor, for the time being shall with the permission in writing of said First Federal Trust Company, or its successor, have full power and authority to do and perform such act or acts of whatever nature as if he had been specifically authorized thereto. Any act so done by said Milton R. Clark, or his successor in trust, shall have the same effect as if done by said First Federal Trust Company, or

its successor, and shall relieve said First Federal Trust Company, or its successor, of any duty or obligation so to do such act, but any instrument given to discharge or cancel this instrument shall be signed by both of the parties of the second part, or their successors. Said First Federal Trust Company, its successor or assigns, shall have the power at any time by an instrument in writing, duly executed by its officers and under its seal, to remove said Milton R. Clark, or his successor, from his position as one of the trustees hereunder.

Either of the parties of the second part herein may resign or discharge itself or himself of the trust created by these presents by notice in writing to the party of the first part, and to said The First National Bank of San Francisco, American National Bank of San Francisco and Welch and Company, thirty (30) days before such resignation shall take effect, or such shorter time as may be accepted by the parties in this paragraph mentioned, and such resignation shall take effect upon the appointment of a successor in trust to such party of the second part so resigning as soon as such successor in trust shall be appointed.

Should any suit or proceeding be brought against the parties of the second part, or either of them, by reason of any matter or thing by reason of either being parties to this instrument, neither of them shall be under any obligation to appear in or defend such suit or proceedings until indemnified to their satisfaction, but may appear in and defend the same without indemnity at their election, and in such case

shall be compensated for so doing. The parties of the second part shall be fully protected in [159] acting upon any notice, request or other paper or document believed by them to be genuine, and to have been signed by the proper person. They may select and employ suitable agents, attorneys, representatives and employees in the performance of any duties that they may deem necessary to perform hereunder, and a reasonable compensation and expenses, including traveling expenses of such representatives, shall be paid by the party of the first part to the parties of the second part, and in default of such payment, such compensation and expenses shall be a charge upon the property hereby mortgaged. The parties of the second part shall not be answerable in any case for any act or default of any agent, attorney, representative or employee selected by them with reasonable discretion. The parties of the second part shall not be liable for any loss or damage in connection with the performance of their duties hereunder, except for their gross negligence or willful neglect.

The parties of the second part shall be under no obligation or duty to perform any act hereunder, unless requested in writing so to do by duly appointed representatives of said The First National Bank of San Francisco, American National Bank of San Francisco and Welch and Company, and unless indemnified to their full satisfaction for so doing, and if the parties of the second part shall incur any expense of any kind in connection with the performance of their duties hereunder, such expenses shall

constitute a first lien upon the property covered by this mortgage, and shall be secured hereby. The parties of the second part shall have the exclusive right of action hereunder, and no party hereby secured shall be entitled to commence any action to enforce these presents, unless the parties of the second part shall refuse or fail so to do when properly thereunto requested.

The parties of the second part shall not be responsible for the filing or recording of this instrument, or any instrument supplemental thereto, or for insuring against fire of any of the property [160] hereby secured, and shall not be required to keep themselves informed or advised as to the payment of any liens, taxes or other charges against said property.

All recitals of fact herein shall be taken as statements made by the party of the first part, and shall not be construed as made by the parties of the second part, and the parties of the second part assume no responsibility as to the correctness of the same.

The written statements of said representatives of The First National Bank of San Francisco, American National Bank of San Francisco and Welch and Company may be received by the parties of the second part as sufficient evidence of any facts in connection with the duties of the parties of the second part under this instrument and shall be a full warrant to the parties of the second part for any action taken by them upon the faith thereof, and the parties of the second part shall not be chargeable with notice of any default upon the part of the party

of the first part, except upon delivery to the First Federal Trust Company of a specification in writing of such default signed by the representatives of said The First National Bank of San Francisco, American National Bank of San Francisco and Welch and Company.

The appointment of a successor to said First Federal Trust Company, the removal of said Milton R. Clark, or his successor, and the appointment of a successor to said Milton R. Clark, or his successor, may be evidenced by the filing for record in the respective offices where this mortgage may be recorded of an instrument in writing, signed and acknowledged by the parties herein designed as respectively entitled to make such appointment or removal.

The provisions of this instrument shall be held to apply and be binding upon the successor or successors and assigns of both mortgagor and mortgagees.

In Witness Whereof, said S. E. Slade Lumber Company, party of the first part, has caused its corporate seal to be hereunto [161] fixed and this instrument to be signed in its corporate name by its president, and attested by its secretary, for and on its behalf, pursuant to resolution of its board of directors, all as of the day and year first above written.

S. E. SLADE LUMBER COMPANY.

By S. E. SLADE,
President.

Attest: A. H. COLE,
Secretary.

[Seal S. E. Slade Lumber Company, Incorporated
Dec. 30, 1905.] [162]

**Exhibit "A"—Agreement, July 31, 1912, Between
S. E. Slade Lumber Co. and Warren Co.**

THIS AGREEMENT, Made and entered into this 31st day of July, A. D. 1912, by and between S. E. Slade Lumber Company, a corporation, duly organized and existing under and by virtue of the laws of the State of California, and having complied with all the laws of the State of Washington, with reference to foreign corporations, and authorized to do business in the State of Washington, as the party of the first part, and Warren Company, a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, and having complied with all the laws of the State of Washington, and having its principal place of business at Aberdeen, Washington, as party of the second part, Witnesseth:

WHEREAS, The said party of the first part is the owner of all the timber and lands hereinafter particularly described and it has heretofore issued and sold its bonds in the sum of one million dollars, and has secured the payment of such bonds by trust mortgage, given to Detroit Trust Company, such mortgage covering the above mentioned lands, together with others, and which said mortgage provides for the payment annually of certain portions of the principal thereof, and provides for semi-annual payments of interest, and further provides among other things, for the removal of the timber on the said lands by paying to the said Trust Company, Mortgagee, at the rate of three dollars (\$3) per

thousand feet as such timber shall be removed, and a part of the said mortgage has already been paid,

AND WHEREAS, The said party has logged a small portion of the said timber and now has in the water certain saw logs, marked and branded thus:

$\left(\begin{smallmatrix} 3 \\ 4 \end{smallmatrix} \right)$, which shall continue to belong to it, and

first party has to a certain extent, made various improvements with reference to the removal of the said timber, and has on said grounds, logging camps, logging outfits, tools, implements, appliances and provisions. [163]

NOW THEREFORE, It is agreed between the parties hereto as follows:

First. The party of the first part, for and in consideration of the sum of forty thousand dollars (\$40,000), to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell, convey and confirm, unto the said party of the second part, and to its successors and assigns, the following described property, to wit:

All of the logging outfit of the said first party, now being and located upon and about the above-mentioned lands, such logging outfit consisting of logging engines, cables, wire, axes, saws, hammers, wedges, blocks and other tools, implements and appliances; intending hereby to convey to the second party, all of the logging outfit of the first party, now located upon or near the lands hereinafter more particularly described; also all of the logging camps of the first party, located on such lands; also all of the first party's camp outfits, consisting of cooking uten-

sils and kitchen and dining-room ware and furniture; also all manner and kind of dams, skid roads, logging roads, and improvements of whatsoever kind or character, except logs in skid roads, now located on any of the said lands; the intention being to hereby convey for said consideration, all of the logging and camp outfit and improvements, except logs in skid roads, of the said first party, located upon the said lands or any thereof, and the said first party does hereby covenant and agree to and with the said second party, its successors and assigns, that it is the owner of all of the said property, and has a good right to convey the same, and that there are no incumbrances upon or against the same, except the above-mentioned trust [164] mortgage, and that it will warrant and defend the title thereto unto the said second party, its successors and assigns, against the lawful claims and demands of all persons whomsoever.

Second. Upon the terms and conditions, and for the considerations hereinafter particularly set out, the first party does hereby give and grant unto the second party, its successors and assigns, the right and privilege of cutting, removing and marketing all of the merchantable timber located, being, standing or fallen upon the following described lands in Chehalis County, State of Washington, to wit:

The South half of the Southeast Quarter of Section 11; the northeast quarter of Section 14; the South half of the Northwest quarter of Section 14; an undivided one-half interest in the Southeast quarter of Section 14; the East half of the Northeast

quarter of Section 23; the Northwest quarter of Section 23; the South half of Section 15; all of Section 22; all of Section 27; the Northeast quarter of Section 34; the Southwest quarter of Section 34; the Northeast quarter of Section 21; the East half of the Northwest quarter of Section 21; the South half of Section 21; all of Section 28; all of Section 33; the Northeast quarter of Section 32; the Southeast quarter of the Northwest quarter of Section 32; the Southeast quarter of Section 32; the South half of the Southwest quarter of Section 32, and the Northeast quarter of the Southwest quarter of Section 32. All said lands being in Township 21 North, Range 9 West Willamette Meridian, in Chehalis County, Washington. And the first party hereby does covenant and agree to and with the second party, its successors and assigns, that it is the owner in fee simple of all the above-described lands and timber, and that there are no incumbrances upon or against the same, except the mortgage hereinabove and hereinafter mentioned. [165]

And the first party does further give and grant unto the second party, its successors and assigns, the right and privilege of going upon the said lands, or any thereof, and placing thereupon, all such logging outfits, camps, improvements, logging roads, logging chutes, dams and other appliances, and generally exercising such privileges, as may be proper or necessary in the orderly removal and marketing of said timber, and the said party hereby agrees to go upon the said lands, and to cut, remove and market all of the merchantable timber on the said lands, whether

the same be standing or fallen, upon the terms and conditions hereinafter particularly set out.

Third. It is agreed between the parties hereto that the second party, its successors and assigns, shall and it is hereby agreed that it will cut and put into the waters of the Humptulips River, or one or more of its branches, or otherwise cut and remove not less than fifty million feet of said timber each and every year until the whole of said timber shall have been cut and removed, and the time for the commencement of the first year within which such amount of timber shall be removed is hereby fixed as September first, 1912; provided, however, in case for any reason the second party does not cut and remove the amount of fifty million feet per year as aforesaid, such failure shall not be considered a breach of this agreement, if the monthly payments of twelve thousand five hundred dollars (\$12,500) are made as hereinafter provided.

Fourth. The said second party hereby agrees and it shall be its duty to cut the said timber in a good and workmanlike manner, and to cut the same clean as it goes, and shall cut, remove and put in the water, or otherwise remove, all of the merchantable timber located on the said lands. The said second party shall be careful about fires, and shall not at any time, have fallen in the woods, an undue amount of timber or logs, all to the end of protecting the said timber and logs from destruction by fire. [166]

Should the second party use for fire wood, for dams or camps or other purpose except skid roads, any merchantable timber, it shall keep an accurate

account and scale thereof, and shall within thirty days after using such timber for such purposes, pay to the said first party the reasonable stumpage value of the timber so used. If the parties are unable to agree upon such reasonable value, then the parties hereto shall agree upon an individual, whose duty it shall be to estimate the amount of timber so used, and to fix the reasonable stumpage value thereof, and the determination of such third party shall be binding upon the parties hereto, and settlement shall be made according to his determination.

It is understood that second party may subsequently take to market, timber which it shall have put into camps, or dams or otherwise except skid roads, and which shall have been paid for as hereinbefore provided, and it is therefore understood that any such timber so used and paid for, and which may be subsequently branded by the second party, with some brand different from the general brand hereinafter provided for, and such timber or logs so used and paid for, shall become and remain the absolute property of the second party, and it shall not be required to make any other or further payments therefor; provided, however, the provisions herein shall not apply to any timber which is at this time placed in any dams, logging roads, logging chutes or otherwise.

Fifth. It is agreed between the parties hereto that the second party shall, and it hereby agrees that it will, until the whole of said timber shall have been cut and removed, on the first day of each and every month, commencing on the first day of September,

1912, pay in cash to the first party, the sum of twelve thousand five hundred dollars (\$12,500) the same representing Three Dollars (\$3) per thousand feet on four million, one hundred and sixty-six thousand, six hundred sixty-six (4,166,666) feet of timber. Should during any such month the second party cut and remove an amount of timber in excess of the aforesaid 4,166,666 feet, then it shall at [167] the end of each such month, pay to the first party, cash at the rate of three dollars (\$3) per thousand feet for all such excess during such month, (except as in this subdivision as hereinafter provided), and second party shall on the first of each month during the life of this contract, make in writing to first party an estimate of the number of feet of timber it proposes or expects to cut and put in during such month, and to the end that it may be known at the end of each month, whether or not any excess has been put in, it shall be the duty of second party to keep an accurate camp scale of the logs put in the water during each such month, and at the end of each month second party shall furnish first party a sworn statement showing the number of logs and amount of feet put in during such month.

But, however, with reference to such excess, if at the end of any month during the life of this contract, the aggregate amounts of advancements theretofore made by second party to first party, should be in excess of the aggregate of the amount of logs at that time put in at said three dollars (\$3) per thousand feet, and if during such month second party should put in more than said 4,166,666 feet, camp

scale, then instead of paying first party on such excess at the rate of three dollars (\$3) per thousand feet as heretofore provided, such excess, or so much thereof, as shall be necessary, shall go to balance accounts and any sum more than sufficient to balance accounts shall be paid by second party to first party. For illustration: suppose first party on November first shall have received from second party an advancement as aforesaid in the sum of \$12,500 and during that month second party puts in one-half of the said 4,166,666 feet, first party would have been paid \$6,250 more than the logs put in during such month would come to at said \$3 per thousand feet, and suppose during December following second party should put in 6,250,000 feet, then second party would not at the end of such month be required to pay to first party any of such excess, because the account would be balanced; [168] that is, the total advancements would equal the total number of feet put in at \$3 per thousand feet; and so this process shall run throughout the term of this contract and at the end of this contract there shall be a final adjustment and settlement between the parties hereto to the end that the total advancement to first party shall equal the total number of feet according to selling scale put in at \$3 per thousand feet. It being understood and agreed that at such final settlement, the amounts received by each party during the entire contract, after the deduction of the driving, boomage and towage charge of one dollar and twenty-five cents (\$1.25) per thousand feet, shall be made to equal each other, by the party who has re-

ceived more than one-half, paying to the other party a sum sufficient to equalize the amounts received.

Sixth. As the logs aforesaid or other timber products are brought to market and sold, the second party shall have the right and it shall be its duty to deduct from the total selling price the sum of one dollar and twenty-five cents (\$1.25) per thousand feet, based upon the selling scale, for booming, driving, towing, railroading or other charges in transporting such logs to market, and the remainder of the selling price shall be divided equally between the first and second parties, and the second party shall then have the right to deduct from such one-half belonging to the first party, the sum of three dollars (\$3) per thousand feet, according to the selling scale, and may receive payment in cash or mill paper according to the custom of the mills on Grays Harbor at the time of such sale, and shall pay to the first party and the first party shall accept the remainder of its one-half in cash or mill paper as the purchasing mill or mills shall pay, such remainder if to be paid in cash shall be left at the mill where such logs are sold, for the first party, or if the mill to whom the logs are sold shall according to the custom pay in mill paper, then such remainder coming to the first party shall be issued in such mill paper by the mill purchasing, to the first party and such paper shall be left at such purchasing mill for the first party. [169]

For illustration, if a certain raft of logs contain five hundred thousand (500,000) feet according to selling scale, and such raft be sold for five thousand

dollars (\$5000), the second party should deduct from such five thousand dollars (\$5000) one dollar and twenty-five cents (\$1.25) per thousand feet selling scale for booming, driving, towing, or other charges for transportation, or the sum of six hundred twenty-five dollars (\$625), thus leaving four thousand three hundred and seventy-five dollars (\$4,375), which divided into halves would leave to each party two thousand one hundred eighty-seven dollars fifty cents (\$2,187.50), and second party should deduct from the two thousand one hundred eighty-seven dollars fifty cents (\$2,187.50), belonging to the first party, the sum of three dollars (\$3) per thousand feet, or fifteen hundred dollars (\$1500), and take payment therefor, and turn over to the first party, the balance of six hundred eighty-seven dollars fifty cents (\$687.50). This process of settlement shall apply to each raft of logs as it shall be brought to market and sold.

Seventh. The second party shall have no relationship to or connection with the said mortgage or mortgagee, and the first party hereby agrees that it will at all times carry out, live up to and faithfully perform all the terms and conditions of said mortgage and bonds, and will make to said mortgagee all payments of principal and interest, and payments for logging purposes as set out and provided for in said mortgage and bonds. Should the first party fail or refuse to make the said payments or to carry out the terms and provisions of said mortgage or bonds, then the second party for the purpose of protecting itself under this contract, may either declare

this contract at an end, or may in its discretion make all such payments provided for in such mortgage and bonds, and charge such payments to the first party and deduct the same out of any moneys which may be payable then or thereafter from the second part to the first party, under this contract.

[170]

Eighth. The second party hereby agrees that it will seasonably pay all its labor and any and all other charges which if left unpaid would be entitled to a lien upon or against such saw logs or other timber product; that it will not suffer or permit any lien of any kind or character to attach to and be foreclosed or enforced against any of the said logs or timber products, and that it will make all payments herein provided to be made, promptly and strictly in accordance with the provisions and terms of this agreement and that it will faithfully and promptly carry out and perform all the terms and provisions of this agreement devolving upon it, and time is hereby made of the essence of this contract.

It is further agreed between the parties hereto that for the breach of this contract in any substantial point, by second party, it would be very difficult, if not quite impossible, to prove in any court, with any degree of certainty, the actual damage to first party because of any such breach or failure by second party, and therefore and for the purpose of expressly agreeing upon and settling in advance such damage to first party, it is hereby expressly agreed by and between the parties hereto, that for any failure or breach of this contract, on the part of the sec-

ond party, which results in the cancellation or annulment of this contract, the actual damages resulting therefrom to the first party, is and shall be by all courts and parties found to be and held to be the sum of fifty thousand dollars (\$50,000), and it is further agreed between the parties hereto that such sum is and will be the actual and agreed damages under such circumstances, and that the same shall be liquidated damages, representing the actual amount of such damages, and in no sense of the word a penalty, and that in any suit or action by the first party for the recovery of said sum of money, second party shall not be entitled to prove or undertake to prove, in the event of any such breach or violation, any other or less sum as said actual damages. [171]

But if such breach or violation occur, and it be so held by the Courts, then the first party shall be entitled to judgment as a matter of course in the sum aforesaid. In order that the first party may be better protected in case of such a breach of this contract by second party, the second party agrees that it will not during the life of this contract, mortgage any of its property or suffer or permit either the Humptulips Driving Company, Grays Harbor Boom Company, or Humptulips Towing Company to mortgage any of its or their property.

Should it be found or decreed that first party has violated this contract and same should be annulled, then second party may remove from said lands all of its logging outfit, tools, implements and appliances, or should it be found and decreed that the second party has violated this contract and the same

should for that reason be annulled and the second party should have paid in cash the penalty in this subdivision provided, then it the second party may remove from the said lands its said logging outfit, tools, implements and appliances, but shall forfeit to first party all improvements in the way of dams, skid roads, logging roads, logging chutes, camps and other like permanent improvements.

Ninth. Neither of the parties hereto shall be permitted to declare or seek to declare this contract terminated, ended or forfeited, because of any violation thereof by the other party, until and unless such party claiming such violation shall have given to the party so violating, at least fifteen days written notice of such claimed violation and demanded compliance with the contract in respect to the violations set up in such writing.

Tenth. It shall be the duty of the second party to be at all expense in logging the said timber and putting the same into the water or otherwise and getting the same to market and selling the same, and the said first party shall not be required to be at any expense in any of the matters aforesaid, except to participate in the booming, driving and towing charges as hereinbefore [172] provided and the second party shall seasonably and before the same becomes delinquent pay all the taxes levied or lawfully charged upon or against any of its property including its logging outfit, and it shall be the duty of the first party to seasonably and before the same becomes delinquent pay and discharge all taxes lawfully levied or charged upon or against any of said timber and

timber land ; but, however, as to any of the said logs which are in the water or in the boom or in storage each party shall pay one-half thereof.

Eleventh. It shall be the duty of the second party as or before it puts said logs into the water or on cars to plainly and distinctly mark and brand both ends of each log, with the following brand, to wit: S E S, or any other brand which the parties hereto may agree upon, and such brand or brands shall be by the second party recorded as required by law, and second party shall not place the said brand or brands upon any other logs whatsoever, and shall not use the said brand in any other manner or way while this contract is in force.

Twelfth. It is understood between the parties hereto that in all probability the second party, its successors and assigns, will put the said timber and logs into the Humptulips River or some branch or branches thereof, and cause the same to be floated down the said stream or streams towards market, and the said second party agrees that when said logs are in the water it will use a reasonable effort to bring said logs to market with reasonable dispatch. But, however, this provision shall not prohibit second party from in any other manner transporting said logs to market.

Thirteenth. It shall be the privilege and duty of the second party to sell said logs, and it may use its own judgment as to whom (except as to the preference right hereinafter provided) and at what price and when and upon what terms it will sell such logs ; provided, however, it shall use a reasonable discre-

tion in selling logs only to reasonably responsible persons and concerns, and shall sell such logs at the going or market price and generally [173] in the sale of such logs it shall be controlled by the prevailing customs at that time in vogue on Grays Harbor. It shall bear all responsibility and liability, connected with any mill or other paper which it may take or receive on account of the purchase price of such logs, and the first party shall stand all responsibility and liability on account of any mill or other paper which it may receive for its portion of the selling price, as herein provided, in connection with the sale of said logs but not any paper issued to second party. Each raft of logs shall be settled for and verification statement thereof shall be rendered.

It shall be the duty of second party to make to first party accurate statements showing the number and amount of logs put into the water, or on cars and the number and amount of logs sold together with the sale price and the amounts deducted as herein provided, and the amounts paid to the first party, and such statement shall be made every three months.

The first party or any of its duly authorized officers or agents shall have the right at any time during business hours to inspect all scale sheets in so far as the same may concern the said timber or logs, and inspect such of the books of the second party as may tend to give light or information to *is* concerning the said logging operation, to the end that it may obtain information to which it may be entitled under this contract.

Fourteenth. Whereas the first party now has a certain contract or contracts with one W. T. Camerson and the Aberdeen Timber Company, concerning the taking of logs over and across certain lands,

NOW, THEREFORE, the first party does hereby sell and assign to second party such contract or contracts in so far as they have reference to removal of first party's timber and agrees to make a separate transfer and assignment thereof to second party,
[174]

Fifteenth. In as much as the first party does now own and operate a certain sawmill in the city of Aberdeen, Washington, and may continue to own and operate the same.

NOW, THEREFORE, it is agreed between the parties hereto that the said first party shall have the preference right to purchase such of the said saw logs as it may need for the operation of its said mill or any addition or renewals thereof, but in order to exercise such preference right the first party must purchase such logs upon as good terms and scale as second party may be able to obtain from responsible persons or concerns elsewhere on Grays Harbor. The first party shall not have the right to purchase said logs or any thereof except it be willing to give and does give as good a scale and as high a price and as good terms as other reasonably responsible mills on Grays Harbor are willing to give. The intention being that the first party shall merely have the preference right to purchase said logs for the operation of such mill or mills on the same terms and conditions the second party is able to obtain from other

mills or persons on Grays Harbor. Should second party be dissatisfied with the scale given by first party it shall have the same right to take away such logs so scaled as it would have to remove such logs for the same reason from any other mill.

It is not meant hereby to indicate that second party shall be required at any particular time or times to sell said logs or any thereof, but on the contrary it shall be the sole judge as to when and upon what terms and conditions it will sell such logs.

Should the first party at any time sell the said mill or lease the same for operation, it shall have the right to assign to such person or concern to whom such mill may be sold or leased, the preference right to purchase logs in this paragraph provided. [175]

Sixteenth. The terms and conditions of this agreement shall not and cannot be in anywise by either party hereto modified, changed, altered, added to or subtracted from, except by an agreement in writing duly executed by the parties, and no attempt at such change, alteration, modification, addition or subtraction shall be binding on either of the parties hereto or be enforceable in any Court or elsewhere, except such be in writing and executed as aforesaid.

Seventeenth. It is understood and agreed between the parties hereto that each of such parties shall be bound and obligated to faithfully, fully and promptly carry out, fulfill and perform all the terms and obligations hereof devolving upon such party, and for a breach of this contract in any substantial points or manner by either party, the other party

shall upon giving the written notice hereinabove provided for, be entitled, at the expiration of the time named in said notice, to at once declare this contract and all the rights and privileges thereunder ended, and all rights and privileges of the party so breaching this contract shall cease, except as to such portion of the contract as shall have heretofore been carried out and performed. But if, however, before the date of the expiration of such notice the party in default shall perform such act as to which it is in default, such forfeiture cannot be enforced.

Eighteenth. The terms and conditions of this agreement are binding upon each of the parties hereto their and each of their successors and assigns, in so far as such terms and conditions devolve upon such party. The second party shall not sell, assign or transfer or undertake to sell, assign or transfer this contract or any interest therein, without first having obtained the written consent of the first party so to do, and any attempted sale, assignment or transfer in violation of this subdivision, shall at the option of the first [176] party to be void and of no force or effect.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed in triplicate on this 31st day of July, 1912.

S. E. SLADE LUMBER CO.

By (Signed) S. E. SLADE,
Its President.

Attest: (Signed) A. H. COLE,
Its Secretary.

WARREN COMPANY,
By (Signed) GEORGE F. STONE,
Its President.

Attest: (Signed) M. J. BEATTY,
Its Secretary.

State of Washington,
County of Chehalis,—ss.

On this 8th day of August, 1912, before me personally appeared George F. Stone and M. J. Beaty, to me well known to be respectively the president and secretary of Warren Company, the corporation which executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of the said corporation for the uses and purposes therein mentioned, and each on oath stated that he was authorized to execute the said Instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year first above in this certificate written.

(Signed) J. B. BRIDGES,
Notary Public for the State of Washington, Residing
at Aberdeen. [177]

State of California.

City and County of San Francisco,—ss.

On this 31st day of July, 1912, before me personally appeared S. E. Slade and A. H. Cole to me well known to be respectively the president and secretary of S. E. Slade Lumber Company, the corporation

which executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute the said instrument and that the seal affixed thereto is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year first above in this certificate written.

(Signed) ROBT. J. TYSON,
Notary Public for the State of California, Residing
at San Francisco. [178]

**Exhibit "B"—Letter, May 26, 1914, S. E. Slade
Lumber Co. to Warren Co.**

(COPY)

Warren Company,
Aberdeen, Wash.

Gentlemen:

Referring to contract dated July 31, 1912, between the undersigned, S. E. Slade Lumber Company, and Warren Company, for the logging of certain timber in Township 21 North, Range 9 West, Chehalis County, Washington, you are hereby notified that you are now in default under the terms of that contract for failure on your part to pay the sum of \$12,500 which became due under said contract on May 1, 1914, and demand is hereby made upon you for the payment of the said sum of \$12,500, and unless said sum is paid by you within fifteen days after the service of this notice upon you, you will be liable

to be proceeded against for forfeiture of said contract and subjected to the payment of the damages stipulated in said contract. Your attention is called to paragraph 9 of said contract, pursuant to which this notice is given to you.

Dated, May 26, 1914.

S. E. SLADE LUMBER COMPANY.

By W. B. MACK,
Mgr. [179]

**Exhibit "C"—Assignment, June 19, 1914, S. E. Slade
Lumber Co. to H. P. Brown.**

WHEREAS, on the 19th day of June A. D. 1914, The Warren Company, a corporation, under the laws of the State of Washington, made, executed and delivered to the S. E. Slade Lumber Company, a corporation, a document in writing entitled an "Option," a copy of which is hereto annexed, marked Exhibit "A," and made a part hereof;

And now, July 1st, 1914, for value received, the above-named S. E. Slade Lumber Company, a corporation organized under the laws of the State of California, have and do hereby sell, assign, transfer and set over unto H. P. Brown, of San Francisco, State of California, all of its right, title, interest and claim in and to the above-mentioned "Option," together with all of its rights therein and obligations thereunder.

IN WITNESS WHEREOF, the said S. E. Slade Lumber Company have caused these presents to be executed by its President and attested by its Sec-

retary the day and year aforesaid.

S. E. SLADE LUMBER COMPANY,

By (Signed) S. E. SLADE,

President.

Attest: (Signed) A. H. COLE,

Secretary [180]

Exhibit "D"—Minutes of Trustees.

Minutes of First Meeting of Board of Trustees of Humptulips Logging Company, a Corporation of Aberdeen, Washington, Held in the Office of Messrs. Bridges and Bruener, Attorneys-at-law, in Aberdeen, Washington, on the 18th day of July, 1914, at the Hour of 9:15 O'clock A. M.

The first meeting of the Board of Trustees of Humptulips Logging Company, a corporation, was held immediately after the first meeting of the Stockholders of said company, in the City of Aberdeen, Washington, on the 18th day of July, 1914, at the hour of 9:15 A. M., in the office of Messrs. Bridges & Bruener, Attorneys at law, all of the trustees, to wit:

H. P. Brown, W. B. Mack, and C. A. Pitchford, were present and participated in the meeting. All of the trustees took the oath of office as required by law, and said oaths were ordered filed.

Mr. H. P. Brown elected chairman of the meeting and M. W. B. Mack, was elected Secretary thereof.

The first question before the meeting, was the election of officers. Upon motion duly made, seconded and unanimously carried, the following were elected as the officers of the company to act in such capacity

until the next regular annual meeting of the Board of Directors, as provided in the By-laws or until their successors be duly elected and qualified:

H. P. Brown, President,

W. B. Mack, Vice-President.

C. A. Pitchford, Secretary and Treasurer.

The subscriptions of H. P. Brown, W. B. Mack and C. A. Pitchford to the Capital Stock of the Company, were accepted by the Board and ordered filed with the Secretary.

The Secretary was instructed to have printed certificates of Stock, such certificates to bear the name of Humptulips Logging Company, the amount of its capitalization [181] and the par value of each share, and such certificate and the margin thereof, to be in other respects in the ordinary and usual form.

A Seal bearing the following impression—

“Humptulips Logging Company, Aberdeen, Washington, Incorporated, July 16th, 1914.”

was presented to the meeting and accepted as the corporate seal of the company, and it was ordered that the impression of the seal be made on the face of these minutes.

The next question before the Board was the payment to the corporation of the Capital Stock subscribed for, and the question of acquiring such personal and real property necessary, proper, useful convenient or advisable for the purpose of engaging in the logging business, and in general of doing such things and purchasing such property for the purpose of carrying out the purposes for which the cor-

poration was organized. On this question, H. P. Brown, as an individual, and not as a Trustee of the Company, made to the Board the following statement and proposition:

“The Warren Company, a corporation of Aberdeen, Washington, heretofore engaged in logging the timber lands of the S. E. Slade Lumber Company in Township 21, Range 9 West, under contract with the latter company, is insolvent. Said Company is the owner of the stock of the Grays Harbor Boom Company, a corporation, of the Humptulips Driving Company, a corporation, and of Humptulips Towing Company, a corporation, all of Aberdeen Washington; of approximately twenty (20) million feet of logs lying in and about the Humptulips River, in the boom of the Grays Harbor Boom Company, in the flow waters of Furlough Creek, and in and about the camps of the said Warren Company in Township 21, Range 9 West; of a large logging outfit, camps, skidroads, dams, engines, and a vast amount of other personal property that it has used in the operation of its logging [182] business; also certain real estate. The assets of the said company will be more particularly described in the option which will be later presented to the Board. The liabilities of the company aggregate approximately \$450,000.00, divided as follows:

- A. To general creditors, including labor liens,
\$125,000.00
- B. To moneys due to Stockholders for advance-
ments made, approximately, \$250,000.00

C. To S. E. Slade Lumber Company for advancements due under the contract referred to and for liquidated damages for the breach of said contract, \$75,000.00

That said Warren Company, in order to pay its general creditors, including labor, did make, execute and deliver unto S. E. Slade Lumber Company, a corporation, an option, under the terms of which the said Warren Company did agree to turn over to the said S. E. Slade Lumber Company, all of the assets of the said Warren Company, except subscriptions to the capital stock, if any, remaining unpaid, in consideration of the said S. E. Slade Company, either paying the general creditors of the said Warren Company, whose debts aggregate \$125,000 as above stated, or cause the said Warren Company to be released from said indebtedness, the said Warren Company at the same time agreeing to cause its Stockholders Notes outstanding, aggregating as above stated the sum of \$250,000 to be returned to the company and cancelled and to cause its Stockholders to pay the indebtedness owing by the said Warren Company to several banks, and which was guaranteed by the said Stockholders; that said option is in words and figures following, to wit: [183]

OPTION.

Aberdeen, Washington, June 19, 1914.

The WARREN COMPANY does hereby give to S. E. Slade Lumber Company, a corporation, the exclusive right and option for the period of Thirty (30) days from the date hereof, to purchase from it,

properties and assets belonging to the company, as hereinafter set out, for the considerations hereinafter set out. The word "purchaser" hereinafter mentioned, means the corporation to which this option is given, or its assigns. In the event that the said option should not be exercised within the said thirty days, or in the event during that period the said Warren Company should be thrown into the hands of a Receiver or into Bankruptcy or other insolvency proceedings in any court, then this option shall at that time terminate.

The property covered by this option and the consideration and terms and conditions thereof, are as follows:

1. PROPERTY.

All of its saw-logs and other timber products now in any of the waters within the borders of Chehalis County, Washington, being approximately Twenty Million Feet, board measure and any and all saw-logs or other timber products in which it may have any interest and being and lying on the ground, said logs being cut from the S. E. Slade Lumber Company lands tributary to the upper stretches of the Hump-tulips River in said county;

Also all of its logging engines, logging equipment, tools, implements and appliances, wheresoever the same may be located, and the same being located for the main part on the said S. E. Slade Lumber Company lands or near thereto, and a part thereof in the company's warehouse or offices in [184] Aberdeen, Washington;

Also all logging roads, logging chutes, skidroads, logging camps and camp outfit and equipment; all blacksmith's outfits;

Also a certain dam located on Widow Creek, which is a tributary to the East fork of the Humptulips River;

Also any and all cable, wire rope, haulback rope, sleds and other appliances used in and forming a part of the logging outfit and operations of the said Warren Company;

Also any and all counts due or owing to the said Warren Company at this time, or at the time of the actual transfer of such property (the Warren Company, however, retains all of its Books of account);

Also all of the Capital Stock of each of the Humptulips Driving Company, the Grays Harbor Boom Company and the Humptulips Towing Company;

Also any and all horses, wagons, autos, auto-truck, or other personal property owned by the said Warren Company, or in which it has any interest;

Also the following described real estate, to wit:

The SE. $\frac{1}{4}$ of Section 23, and the NE. $\frac{1}{4}$ of Section 26, all in Township 21, North, Range 9, West of the Willamette Meridian, in said Chehalis County, Washington,

together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining excepting and reserving however, to A. P. Stockwell and J. B. Bridges and to W. T. Cameron, and the C. E. Burrows Company, and to each and all of them, the right and privilege of going upon the said lands or any there-

of, for the purpose of taking saw-logs and other timber products over and across the said lands all as particularly provided in that certain deed from Aberdeen Timber Company to Warren Company, dated October 10th, 1912, and recorded in Book 117 of the Record of Deeds of Chehalis County, Washington, at page 358; [185]

Also the following described contracts, to wit:

A contract between Warren Company and W. T. Cameron, dated October 10th, 1912;

A contract between Warren Company as the first party, and W. T. Cameron and Aberdeen Timber Company as the second parties, and dated October 10th, 1912;

A contract between Warren Company as the first party, and Cameron-Hoover Logging Company as the second party, and dated December 30th, 1913;

A contract between Warren Company as the first party, and W. T. Cameron as the second party, and dated October 10th, 1912;

A contract between S. E. Slade Lumber Company as the first party, and Warren Company as the second party, and dated July 31st, 1912;

A contract between Polson Logging Company, a corporation, as the first party, and the Warren Company and the Humptulips Driving Company as the second party, and dated January 7th, 1914;

A contract between Warren Company as the first party and Cameron-Hoover Logging Company as the Second party, and dated December 1st, 1913;

A contract between Northern Pacific Railway Company and Warren Company, and dated July 17th, 1913; also

A conditional Sale Contract between Big Creek Timber Company as the first party, and Warren Company as the second party, and dated January 8th, 1914.

The intention being to hereby describe any and all of the personal property of whatsoever kind or character of the said Warren Company, except only any liability of the present or any Stockholders of the Warren Company, upon any subscription, written or otherwise, to or for the capital stock of the said Warren Company, or any part thereof, and except any and all moneys actually on hand, and the books of account of the [186] company.

2. CONSIDERATION.

The consideration for the said sale and property, shall be the agreement and assumption by the purchaser, to pay the following debts and obligations of the Warren Company and the said companies of which it holds the capital stock, to wit;

Aberdeen Electric Co	2.50
Aberdeen Sheet Metal Works	4.85
Aberdeen Manufacturing Co.	49.65
Big Creek Timber Co.	8,803.32
C. E. Burrows Co.	195.57
Benson Office Supply Co.	6.65
A. M. Bendetson	861.96
Beckenhauer Drug Co.	22.40
Bridges & Bruener	400.82
Berg, John	11.45
Bay City Lumber Co.	1.75
Brown-Elmore Shoe Co.	8.50
Baker, J. W. Hardware Co.	1.60
Broderick Bascom Wire Rope Co.	41.25

Carstens Packing Co.	554.51
H. L. Cooke Co.	8.71
City Retail Lumber Co.	2.72
Chehalis Produce Co.	1021.63
Cameron-Hoover Logging Co.	4.00
Davidson Bros.	22.65
Douglas Bros.	42.00
Donovan Lumber Co.	48.00
Evans, C. F. W.	114.85
Evans, Mrs. R. E.	38.60
Employers Association	30.00
F. & F. Garage	12.50
Frye & Company	4,671.92
Foster, F. G. Co.	5,971.41
Grays Harbor Blow Pipe Co.	11.81
Gloss Steam Laundry	2.95
Grays Harbor Boiler Works	165.82
Grays Harbor Flour Co.	406.50
Grays Harbor Ship Chandlery	7.90
Gabrielson & Holmer	74.30
Grays Harbor Hardware Co.	1,368.99
Hoquiam Auto Co.	12.75
Hazelwood Co.	89.12
Hunt, E. G.	88.50
Isaacson, L. G. Co.	1,429.12
Industrial Insurance Commission	890.63
Johnson, C. E.	36.00
Jones & Paine	175.00
Johnston Transfer Co.	32.60
Lamb Machine Co.	237.40
Lebo, W. R. Co.	5.60
Loggers & Contractors Mchny. Co.	21.52

Looms, N. T.	230.85
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Like, C. D.	11.75
Lindstrom Shipbuilding Co.	123.48
Multonomah Iron Works	3.27
Mill & Mine Supply Co.	294.99
McPhee, Al.	32.80
McBride & Hamblen	59.35
Meadowbrook Creamery Co.	2.25
Nelson, N.	543.15
Nelson, N. F.	1.50
Northwest Supply Co.	3.45
National Grocery Co.	23.00
Ovitt Company	5.75
Pacific Telephone & Telegraph Co.	7.05
Puget Sound & Alaska Powder Co. ...	363.40
Pacific Fruit & Produce Co.	222.15
Puget Sound Iron & Steel Works	149.50
Poulson Auto Co.	284.82
Roebbling, J. A. Sons Co.	897.28
Robinson, J. J. ....	.90
Kelly, Ed.	1.50
Slade Lumber Co.	10.40
Schwabacher Bros Co.	539.32
Standard Oil Co.	1037.30
Willamette Iron & Steel Works	424.10
West Coast Produce Co.	617.90
Waugh, J. S.	10.60
Washington Iron Works	251.85
Washington Paint & Wall Paper Co. ..	3.75
Whiteside Undertaking Co.	50.00
Welsh & Richards Co.	35.75
Western Union Telegraph Co.	17.50

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Grays Harbor Hospital	781.50
Aberdeen Timber Co.....	1,324.10
Bridges & Stockwell	983.52
Taxes (Grays Harbor Boom Co.)—1913	333.69
Overdraft Warren Savings Bank.....	762.50
Polson Logging Co. (Doubtful).....	408.54
Neumeyer & Diamond	750.33
<hr/>	
Total	\$ 29,417.03
Pay-roll to May 31st, 1914	19,259.79
Pay-roll Estimated June 1st to 4th....	570.00
Demand Loans of Hayes & Hayes	6,100.00
Note to Willamette Iron & Steel Wks.	4,000.00
Demand Loan of Miner D. Crary	4,000.00
Demand Loan of National Bank of Com- merce of Seattle, amounting to \$45,000	45,000.00
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Interest on Bills Payable to June 4th, 1914	3,727.02
<hr/>	
Grand Total	\$ 112,273.84

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Also all costs, expenses and attorney's fees in connection with any and all labor liens on saw-logs and other timber products of the Warren Company, and also any and all strictly operating expenses of the said Warren Company and the said three companies with stock it holds, since June 4th, 1914, to the time of the consummation of such sale, and also shall the said purchaser become liable for any of the debts or obligations of the Warren Company, other than

to stockholders and other than those hereinabove particularly described, in an amount not to exceed the sum of \$1,000, the said \$1,000, being for the purpose of fully covering any items of expense which the purchaser should pay and which may for some reason or other have been omitted from the foregoing list; or the said purchaser may pay the said sums of money to the said Warren Company in cash. But in the event the purchaser elects to assume and agrees to pay such debts and obligations, then before such transfer of property shall be made to such purchaser, the latter shall obtain from such creditors, a written statement signed by each of such creditors, to the effect that each such creditor relieves and releases the said Warren Company from any and all liability and elects exclusively to look to such purchaser for payment, and which said releases shall be in all respects to the satisfaction of the Vice President and Secretary of the Warren Company—all to the end that the said Warren Company shall henceforth not be liable for or be called upon to pay any of the said debts or obligations.

3. FURTHER CONSIDERATION.

The further consideration for the said transfer shall be that the purchaser or purchasers shall obtain from the said Cameron & Hoover Logging Company, and from the said Cameron and the said S. E. Slade Lumber Company and Aberdeen Timber Company and J. B. Bridges and A. P. Stockwell, full and complete release of the said Warren Company from any and all of the [189] obligations or duties of the said Warren Company performed or to be per-

formed or done under and by virtue of any of the hereinbefore particularly mentioned contracts, and shall also agree to protect the said Warren Company against any and all demands of Polson Logging Company under and by virtue of the aforesaid Polson Logging Company contract, all to the end that the said Warren Company shall be forever relieved and released of and from all such obligations, and all such releases shall be to the satisfaction of the Vice-president and Secretary of the said company.

WITNESS THE NAME AND SEAL of the said WARREN COMPANY, by its Vice-President and Secretary, all on the day first hereinabove written.

WARREN COMPANY.

By J. B. BRIDGES, (Signed)
Vice-President.

Attest: J. T. EISWORTH, (Signed)
Secretary. [190]

That said option has been duly assigned by the S. E. Slade Lumber Company, to the speaker, H. P. Brown, who is now the owner and holder thereof, with the right and privilege of exercising said option and to purchase the assets of the said Warren Company, upon the terms and conditions therein stated. That he, the said Brown, did heretofore pay off the liens which had been filed against the logs by the laborers, which liens had been duly assigned to the said Brown, and who is now the owner and holder of such labor liens. That the total amount to be paid by virtue of the terms of said option, including labor liens, did not exceed the sum of \$125,000, and that the reasonable and actual value of the assets of the said Warren Company were in excess of \$300,000.

That the logs owned by the said Warren Company and which are in the boom of the Grays Harbor Boom Company, and about the Humptulips River and in the flow waters of Furlough Creek and in and around the camps of the said Warren Company, aggregate over twenty (20) million feet, board measure, and will net \$7 a thousand, even at the present condition of the log market, thus making a total to be realized from logs, of \$142,800, or more than sufficient to pay the indebtedness of the said Warren Company to be assumed by the person exercising said option, of which the said Brown was the owner and holder. That the assets of the said Warren Company, including the assets of the Humptulips Driving Company, the Grays Harbor Boom Company, and the Humptulips Towing Company, were more particularly as follows: The said Brown then exhibited a printed detailed statement of the assets of said various companies mentioned, and presented them to the Board, and are shown as follows, to wit:

[191]

WARREN COMPANY.

ASSETS.

Auto Truck 1/2.....	800.00
Auto Packard 1/2.....	500.00
Buildings Camp #4.....	1,120.42
“ & Equipment Camp #7.....	8,437.21
“ “ “ #8	6,579.67
County Road	6,121.71
Dam #1 Widow Creek.....	6,443.32
Engines	52,537.49
Evans, C. F. W.	50.00

formed or done under and by virtue of any of the hereinbefore particularly mentioned contracts, and shall also agree to protect the said Warren Company against any and all demands of Polson Logging Company under and by virtue of the aforesaid Polson Logging Company contract, all to the end that the said Warren Company shall be forever relieved and released of and from all such obligations, and all such releases shall be to the satisfaction of the Vice-president and Secretary of the said company.

WITNESS THE NAME AND SEAL of the said WARREN COMPANY, by its Vice-President and Secretary, all on the day first hereinabove written.

WARREN COMPANY.

By J. B. BRIDGES, (Signed)
Vice-President.

Attest: J. T. EISWORTH, (Signed)
Secretary. [190]

That said option has been duly assigned by the S. E. Slade Lumber Company, to the speaker, H. P. Brown, who is now the owner and holder thereof, with the right and privilege of exercising said option and to purchase the assets of the said Warren Company, upon the terms and conditions therein stated. That he, the said Brown, did heretofore pay off the liens which had been filed against the logs by the laborers, which liens had been duly assigned to the said Brown, and who is now the owner and holder of such labor liens. That the total amount to be paid by virtue of the terms of said option, including labor liens, did not exceed the sum of \$125,000, and that the reasonable and actual value of the assets of the said Warren Company were in excess of \$300,000.

That the logs owned by the said Warren Company and which are in the boom of the Grays Harbor Boom Company, and about the Humptulips River and in the flow waters of Furlough Creek and in and around the camps of the said Warren Company, aggregate over twenty (20) million feet, board measure, and will net \$7 a thousand, even at the present condition of the log market, thus making a total to be realized from logs, of \$142,800, or more than sufficient to pay the indebtedness of the said Warren Company to be assumed by the person exercising said option, of which the said Brown was the owner and holder. That the assets of the said Warren Company, including the assets of the Humptulips Driving Company, the Grays Harbor Boom Company, and the Humptulips Towing Company, were more particularly as follows: The said Brown then exhibited a printed detailed statement of the assets of said various companies mentioned, and presented them to the Board, and are shown as follows, to wit:

[191]

WARREN COMPANY.

ASSETS.

Auto Truck	1½.....	800.00
Auto Packard	1½.....	500.00
Buildings Camp	#4.....	1,120.42
“	& Equipment Camp #7.....	8,437.21
“	“ “ #8	6,579.67
County Road	.....	6,121.71
Dam #1 Widow Creek	.....	6,443.32
Engines	.....	52,537.49
Evans, C. F. W.	.....	50.00

Horses, Wagons & Harness.....	1,785.52
Road, Tote #2.....	5,726.60
Real Estate	4,905.00
Road, Tote #1.....	1,551.72
Skidroads Camp #7.....	9,448.88
“ “ #8	10,424.86
Telephone Line	912.20
Tools, Camp #7.....	5,201.82
“ “ #8	5,438.05
Wire Rope Camp #7.....	5,239.15
“ “ “ #8	6,254.91
Dam, Furlough Creek.....	17,848.02
20,400,000 Ft. Logs at \$7.00.....	142,800.00

\$200,136.55

Obligations as shown on option.....\$122,273.84

[192]

HUMPTULIPS DRIVING COMPANY.

ASSETS.

Buildings	300.00
Cribbing	64,222.94
Dam #1	6,000.00
Dam #2	14,645.78
Dam #3	23,135.59
Dam, Fairchilds	1,430.42
Roll Dam 34-21-9.....	1,285.23
Roll Dam #2.....	5,870.37
Equipment	5,392.89
Horses	100.00
Hunley Contract	2,700.00

Real Estate	2,939.57
Telephone Line	448.29
Walker Timber	1,000.00
	<hr/>
	\$130,480.08

GRAYS HARBOR BOOM COMPANY.

ASSETS.

Boom Plant	34,608.27
Cavils Michigan	949.77
Dwyer, J. J.	150.00
Equipment	2,568.62
Real Estate	9,905.88
	<hr/>
	\$48,182.54

HUMPTULIPS TOWING COMPANY.

ASSETS.

Tola	1,500.00
Oil Scow	256.67
Skookum	13,250.00
	<hr/>
	\$15,006.67

[193]

The said Brown further explained that the said Warren Company had a valuable and extensive logging outfit on the lands of the said S. E. Slade Lumber Company, in Township 21, Range 9; that said country had been extensively opened up by the said Warren Company; that skidroads and other roads had been built, including dams, and other things done and moneys expended for the purpose of facilitating the marketing of said timber. The said Brown then proposed to the Board to assign or cause

to be assigned to the Humptulips Logging Company, said option from the Warren Company, there by giving to the said Humptulips Logging Company all its right, title, claim or interest in the same, thus enabling the said Humptulips Logging Co. to exercise said option, upon the same terms and conditions that the said Brown could or might exercise the same; that in consideration of the sale by the said Brown to the said Humptulips Logging Company, of the assets of the said Warren Company by assigning and turning over to said company the option referred to, the said Humptulips Logging Company should repay to the said Brown, the amounts paid out by him in acquiring the labor liens against the logs of the said Warren Company, including all attorney's fees necessarily paid out by him and with the approval of the court, in taking such assignments, and to fully pay up the subscriptions to the capital stock of the company, of H. P. Brown, W. B. Mack and C. A. Pitchford, and to cause to be executed, and delivered to the said Brown, Mack and Pitchford, certificates of Stock of the said company, fully paid up, in the amounts and in the number of shares to which each of said subscribers are entitled. This would make a total, including the capital stock, of approximately \$225,000.00, to be paid by the new company for the assets of the said Warren Company as described in said Option. [194]

This proposition was discussed at great length by all of the members of the Board, and the matter thoroughly gone into. Mr. W. B. Mack, one of the directors, stated that he was thoroughly familiar

with the assets of the said Warren Company and of what the assets consisted and what the value of said assets were, and said Mack explained at length to the Board, what the new company would get if it accepted the proposition of Mr. Brown, and he considered that the assets of the Warren Company were reasonably worth, conservatively speaking, at least the sum of \$300,000. Before taking any action on the matter, however, the said Board consulted with Mr. A. P. Stockwell, of Aberdeen, Washington, who heretofore had been the manager of the Warren Company, as well as of the Humptulips Driving Company, Grays Harbor Boom Company, and Humptulips Towing Company, and who two or three years before, and for a long time prior thereto, had been the owner of the said Humptulips Driving Company, the said Grays Harbor Boom Company, and of the property now owned by the Humptulips Towing Company, and who was thoroughly familiar with the assets of all of said companies. He went into the matter of said assets, with the Board, very fully, and stated that the assets as represented by Mr. Brown, as shown on the typewritten sheets were taken from the books of the said Warren Company, Humptulips Driving Company, Grays Harbor Boom Company and Humptulips Towing Company, and Mr. Stockwell expressed it as his opinion, that the assets of the said companies which the said Humptulips Logging Company would acquire under the terms of the option, would be considerably in excess of \$200,000.00, and he explained the reasons why said Warren Company had gone insolvent, and why the Stockholders of the said Warren Company were

willing to pay their guarantees to the bank and cancel their notes which the Warren Co. had given them for moneys advanced, stating that said Stockholders were desirous that the [195] general creditors to be paid in full, and that to secure this end they would suffer their losses without expecting any return themselves. That the reasons for the insolvency of the said Warren Company would not be present as far as the Humptulips Logging Company would or might be concerned.

All of the Directors stated that in addition to the advice and opinion of Mr. Stockwell, they had therefore looked into the matter very thoroughly and had taken the opinions of other loggers qualified to speak on the subject, with reference to the value of the assets of the said Warren Company, and it was finally resolved to accept the proposition of the said H. P. Brown and to purchase the assets of the said Warren Company, by causing said option now held by the said Brown, to be assigned to it, the said new company, the said new company to pay the said Brown for said assets and for the assignment of said option, the following consideration:

1. The repayment to the said Brown, of all moneys advanced by him in securing the assignment of labor liens, being approximately \$20,000.

2. The payment of the subscriptions to the capital stock of the said company by the said H. P. Brown, the said W. B. Mack, and the said C. A. Pitchford.

It was further resolved that the proper officers of the company be authorized and directed to accept

the assignment of the said option from the said Brown, and to exercise the said option within the time limited, and to cause to be transferred to the new company, all of the assets of the said Warren Company, including the stock of the other three companies mentioned, upon the terms and conditions contained in said option, and the President and Secretary of the said company were further authorized and directed to cause the Warren Company to be released from the obligations due to its general creditors and to make such arrangements with said creditors with reference [196] to the payment of their claims by the said Humptulips Logging Company, as they could most advantageously make, and said President and Secretary of the Company were given full power and authority to close said deal and to purchase in the name of the company, the assets of the said Warren Company under the terms and conditions of said option, and in general to sign all papers and to do any and all things necessary for the proper carrying out of the terms of said option and the conditions under which said property of the Warren Company could be acquired.

The President and Secretary of the Company were further authorized to issue to the said H. P. Brown, W. B. Mack and C. A. Pitchford, the capital stock of the company fully paid up, to each the number of shares respectively subscribed for by him.

There being no further business before the meet-

ing, the same was duly adjourned.

(Signed) H. P. BROWN,
Chairman.

(Signed) W. B. MACK,
Secretary. [197]

SPECIAL MEETING OF BOARD OF TRUSTEES OF HUMPTULIPS LOGGING COMPANY, A CORPORATION.

A special meeting of the Board of Trustees of Humptulips Logging Company, a corporation, was held at the office of the company in the City of Aberdeen, on the 1st day of August, 1914, at the hour of 10 o'clock, A. M., all of the Trustees, to wit:

H. P. BROWN, W. B. MACK and C. A. PITCHFORD, being present and participating in the meeting. The President, H. P. Brown, was in the chair, and Mr. Pitchford, the regular secretary of the Company, acted as Secretary of the meeting.

All of said Trustees consented to the holding of said meeting for the transaction of such business as might properly come before it.

The following resolution was upon motion duly made and seconded, unanimously carried:

WHEREAS, Humptulips Logging Company is the owner by assignment, of that certain logging contract entered into on the 31st day of July, 1912, by and between S. E. Slade Lumber Company, a corporation organized under the laws of the State of California, as the party of the first part, and Warren Company, a corporation under the Laws of the State of Washington, as the party of the second part, by the terms of which contract the said S. E. Slade

Lumber Company did give to the said Warren Company, the right and privilege of cutting, removing and marketing all of the merchantable timber on the lands of the S. E. Slade Lumber Company situated in Township 21, North of Range 9, West of the Willamette Meridian;

AND WHEREAS, it is to the advantage of the said Humptulips Logging Company to procure a cancellation of said contract; [198]

AND, WHEREAS, it was necessary for the Humptulips Logging Company in its negotiations with W. T. Cameron, to procure for said Cameron a free right-of-way from the said S. E. Slade Lumber Company, across the Southeast Quarter (SE. $\frac{1}{4}$) of Section 34, Township 21, North of Range 9 West, in Chehalis County, Washington, resulting in a loss to the S. E. Slade Lumber Company of approximately \$2,000.

NOW, THEREFORE, IT IS RESOLVED that the Humptulips Logging Company sell and convey to the S. E. Slade Lumber Company, a corporation, by warranty deed, the following described lands situated in Chehalis County, Washington, to wit:

The Southeast Quarter (SE. $\frac{1}{4}$) of Section 23 and the Northeast Quarter (NE. $\frac{1}{4}$) of Section 26, all in Township 21 North, Range 9, West of Willamette Meridian,

subject, however, to the reservations contained in the deed from Aberdeen Timber Company to Warren Company, and which reservations were set forth in the deed from Warren Company to Humptulips Logging Company; the said Humptulips Logging Com-

pany to reserve also in said deed, a right-of-way for itself, for the purpose of taking saw-logs and other timber products over the same; in consideration of the cancellation hereinabove referred to, and in consideration of the free right-of-way heretofore granted by the said S. E. Slade Lumber Company at the request of Humptulips Logging Company, to W. T. Cameron.

IT IS FURTHER RESOLVED that the President and Secretary of the corporation be authorized and directed to sign and deliver said Warranty Deed to the said S. E. Slade Lumber Company and receive from the latter company a cancellation of said logging contract.

HUMPTULIPS LOGGING COMPANY, a corporation, being the owner of all of the Capital Stock of Grays Harbor Boom Company [199] a corporation, Humptulips Driving Company, a corporation, and Humptulips Towing Company, a corporation, it was resolved to authorize H. P. Brown, the President of the Company, or in his absence, or inability to act, W. B. Mack, the Vice-president of the Company, to vote the stock of the several corporations above named owned by the said Humptulips Logging Company, at any and all Stockholders' meetings of the said respective corporations, giving unto the said H. P. Brown, or in his absence or inability to act, the said W. B. Mack, full power and authority to vote said stock at such meetings.

There being no further business before the meet-

ing, the same was duly adjourned.

(Signed) H. P. BROWN,
President.

Attest: (Signed) C. A. PITCHFORD,
Secretary. [200]

THIS INDENTURE, made and entered into this 27th day of July, 1914, by and between Warren Company, a corporation of Aberdeen, Washington, as the party of the first part, and Humptulips Logging Company, a corporation of Aberdeen, Washington, as the party of the second part, WITNESSETH:

That the said party of the first part, for and in consideration of the sum of Ten (\$10.00) Dollars to it in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, and the payment or assumption for payment by the said second party, of certain debts and obligations of the said first party, and which said debts and obligations are more particularly mentioned and described in a certain option dated June 19th, 1914, and *give* by Warren Company to S. E. Slade Lumber Company, a corporation, and by the latter company duly assigned to H. P. Brown, of San Francisco, California, and by the said H. P. Brown in turn duly assigned to the second party herein, does hereby grant, bargain, and sell unto the said party of the second part, and to its successors and assigns, the following described personal property located and being in the County of Chehalis and State of Washington, and particularly described as follows, to-wit:

All of its saw-logs and other timber products now in any of the waters within the borders of Chehalis

County, Washington, being approximately twenty (20) million feet, board measure, and any and all saw-logs or other timber products in which it may have any interest at this time and being and lying on the ground, said logs being cut from the S. E. Slade Lumber Company lands tributary to the upper stretches of the Hump Tulips River in said County, a large [201] portion of said logs being branded with the brands of the said Warren Company as recorded in the County Auditor's office for Chehalis County, Washington.

Also all of its logging engines, logging equipment, tools, implements and appliances, wheresoever the same may be located, and being now for the most part, on the said S. E. Slade Lumber Company lands, or near thereto, and a part thereof being now in the first party's warehouse or offices in Aberdeen, Washington.

Also all of its logging roads, logging chutes, skid-roads, logging camps and camp outfit and equipment, and all blacksmith outfit.

Also a certain dam located in Widow Creek, which is a tributary to the East Fork of the said Hump Tulips River.

Also any and all of its cable, wire-rope, haulback rope, sleds and other appliances used in and forming a part of its logging outfit and logging operations. Also any and all accounts due and owing to the said Warren Company at this date (not including, however, its books).

Also any and all horses, wagons, autos, auto-trucks, or other like or similar property.

Also all of the capital stock of each the Humptulips Driving Company, the Grays Harbor Boom Company and the Humptulips Towing Company.

Also a certain contract between Warren Company and W. T. Cameron, dated October 10th, 1912, and

A contract between Warren Company, as the first party, and W. T. Cameron and Aberdeen Timber Company, as the second parties, and dated October 10th, 1912, and

A contract between Warren Company, as the first party, and Cameron-Hoover Logging Company as the second party, and [202] dated December 30th, 1913, and

A contract between Warren Company, as the first party, and W. T. Cameron, as the second party, and dated October 10th, 1912, and

A contract between S. E. Slade Lumber Company, as the first party, and Warren Company, as the second party, and dated July 31st, 1912, and

A contract between Polson Logging Company, a corporation, as the first party, and the Warren Company and Humptulips Driving Company, as the second parties, and dated January 7th, 1914, and

A contract between Warren Company, as the first party, and Cameron-Hoover Logging Company, as the second party, and dated December 1st, 1913, and

A contract between Northern Pacific Railway Company and Warren Company, and dated July 17th, 1913, and

A conditional sale contract between Big Creek Timber Company, as the first party, and Warren

Company, as the second party, and dated January 8th, 1914.

The intention being to hereby describe and convey any and all of the personal property of the said Warren Company, except liability, if any, of any stockholder of the said Warren Company, upon any subscription, or otherwise, and except the books of account of the said Warren Company and except any and all moneys of the said Warren Company at this time actually on hand.

TO HAVE AND TO HOLD unto the said party of the second part, and to its successors and assigns, forever.

The said party of the first part does hereby covenant and agree to and with the said party of the second part, its successors and assigns, that it is the owner of all of the [203] above-described property, and that there are no encumbrances upon or against the same, except any unpaid taxes for the years 1913 and 1914, and except certain of the said engines and logging outfit held under a conditional sale contract between Big Creek Timber Company, a corporation, and the said first party, and except the said logging roads, logging chutes, skid roads, and the said saw-logs are subject to a certain contract between S. E. Slade Lumber Company as the party of the first part, and Warren Company as the party of the second part, and dated July 31st, 1912, and except certain loggers' liens against all or a part of the said logs, such liens aggregating in the neighborhood of \$20,000, and the said second party receives the title to the said properties, subject to the

said taxes, the said S. E. Slade Lumber Company Contract, the said conditional sale contract, and the said liens upon the said logs.

By the acceptance of this instrument, the said second party agrees, for itself, its successors and assigns, that no stockholder's liability on subscription of capital stock of the said first party shall be enforced either directly or indirectly, for or on account of any breach of the warranties contained in this instrument.

IN WITNESS WHEREOF, the said first party has caused this instrument to be executed by its proper officers thereunto duly authorized and its corporate seal to be hereunto affixed, on the day and year first hereinabove written.

[Seal Warren Company, Aberdeen, Wash. Incorporated Dec. 14, 1910.]

WARREN COMPANY,
By J. B. BRIDGES,
Vice-President.

Attest: J. F. EISWERTH,
Secretary. [204]

State of Washington,
County of Chehalis,—ss.

On this 27th day of July, 1914, before me personally appeared J. B. Bridges and J. F. Eiswerth, to me known to be the Vice-president and Secretary, respectively, of the corporation that executed the within and foregoing instrument, and acknowledged to me that the said instrument was the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath

stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

THEO. B. BRUENER,

[Seal of Notary.]

In and for the State of Washington, Residing at
Aberdeen.

Filed for record July 29th, 1914, at 2 o'clock P. M.
at the request of Bridges & Bruener. R. G. TRASK,
County Auditor. [205]

**Exhibit "E"—Agreement, July, 1914, Between
Warren Co. and S. E. Slade Lumber Co.**

THIS AGREEMENT, Made and entered into this
— day of July, 1914, by and between WARREN
COMPANY, a corporation of Aberdeen, Washing-
ton, as the party of the first part, and S. E. SLADE
LUMBER COMPANY, a corporation organized
under the Laws of the State of California but doing
business within the State of Washington and having
its principal place of business in said State of Wash-
ington in the City of Aberdeen, as the party of the
second part, WITNESSETH;

WHEREAS the party of the first part did enter
into a written contract with the party of the second
part, of date July 31st 1912, by the terms of which
the said party of the first part did agree and under-
take to cut, remove, log and market all of the mer-
chantable timber located, being, standing or fallen

upon the lands of the said second party, in Township 21, Range 9 West of the Willamette Meridian, in Chehalis County, Washington, upon certain and numerous terms and conditions,

AND, WHEREAS, the said party of the first part has thrown up and abandoned said contract and refused further to perform the same, and said company is insolvent,

AND, WHEREAS, the said first party has advanced to the said second party numerous and large sums of money in accordance with the terms of said contract and more particularly with the fifth paragraph thereof,

AND, WHEREAS, the said first party desired to assign, sell and transfer unto HUMPTULIPS LOGGING COMPANY, a corporation of Aberdeen, Washington, said contract and all its rights and interests therein, and the said parties of the first and second part desire to exchange releases, one to the other, of any and all claims, demands or causes of action that either of the said parties may have against the other,

NOW, THEREFOR:

1. The said second party does hereby expressly consent to the transfer and assignment by the said first party to Humptulips Logging Company, a corporation of Aberdeen, Washington, of the contract in the premises hereinabove described, together with all the rights, claim, title and interest of the said first party in and to said contract.

2. In consideration of the consent by second party to the assignment by first party of the con-

tract between the parties hereto, hereinabove described, to Humptulips Logging Company, a corporation, and in consideration of the release and discharge by said first party to second party in the next paragraph contained, the said second party does hereby absolutely and forever release and discharge the said first party from any and all claims for damages and from any and all demands or causes of action that it, the said second party, may have, arising out of or to arise by reason of the breach by the said first party of said contract with the said second party, and of the failure on the part of the said first party to carry out and perform said contract, and said second party does hereby expressly waive any and all claims that it, the [206] said second party, may have for liquidated damages as provided for in said contract for the breach thereof, and does hereby, for itself, its successors and assigns, expressly discharge the said first party from all its obligations arising out of said contract or in any wise connected therewith, hereby cancelling in so far as the said Warren Company is concerned, said contract and all claims and demands that the said second party may have against the said first party thereunder; provided, however, that the rights of the first and second party under said contract to the logs heretofore cut by first party on second party's lands, are hereby expressly recognized and kept in force.

3. The said first party, for and in consideration

of the consent by the said second party to the assignment of the contract above referred to, to Hump-tulips Logging Company, a corporation of Aberdeen, Washington, and in consideration of the release and discharge by the said second party of any and all claims, demands and causes of action that the said second party may have or claim against the said first party by reason of the breach by the said first party of said contract, does hereby fully and forever, for itself, its successors and assigns, release and discharge the said party of the second part from any and all claims, demands or causes of action that it, the said first party, has or may have or claim by reason of its contract with the said second party, or by reason of the performance or non-performance of any terms and conditions thereof, or by reason of any moneys paid to the said second party under and by virtue of the terms of said contract, or by reason of any other matter or thing under or by which the said first party may have or claim to have any demand, claim or cause of action against the said second party in any way connected with said contract, or otherwise.

IN WITNESS WHEREOF the parties hereunto have caused this instrument to be executed by their proper officers and the corporate seals of their respective corporations to be hereunto affixed, on the day and year in this instrument first above written.

WARREN COMPANY.

By _____,
Vice-president.

S. E. SLADE LUMBER COMPANY.

By _____,
President.

_____,
Secretary.

_____,
Secretary.

State of Washington,
County of Chehalis,—ss.

On this — day of July, A. D. 1914, before me personally appeared J. B. Bridges and J. F. Eiswerth, to me known to be the Vice-president and Secretary, respectively, of Warren Company, one of the corporations that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.
[207]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

_____,
Notary Public in and for the State of Washington,
Residing at Aberdeen.

State of California,
County and City of San Francisco,—ss.

On this — day of July, A. D. 1914, before me personally appeared _____ and _____, to me known to be the President and Secretary respectively of S. E. Slade Lumber Company, one of the

corporations that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and year first above written.

Notary Public in and for the State of California,
Residing at San Francisco.

[Endorsed as follows:] Case No. 67-E. United States District Court, Western District of Washington. Detroit Trust Co. et al. vs. S. E. Slade Lumber Co. et al. Petitioner's Exhibit "D." Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Aug. 24, 1916. Frank L. Crosby, Clerk. By _____, Deputy. [208]

*In the District Court of the United States, for the
Western District of Washington, Southern Division.*

No. 67—IN EQUITY.

DETROIT TRUST COMPANY et al., Plaintiffs,
vs. S. E. SLADE LUMBER COMPANY et al.,
Defendants.

Testimony of Receiver and Humptulips Logging Co.

[209] I.

Attached to the petition of plaintiffs for the ap-

pointment of a Receiver is the assent of S. E. Slade Lumber Company, Humptulips Logging Company and Slade-Wells Logging Company, with a prayer that the Court make the order applied for.

II.

At the time of the appointment of the receiver herein, American National Bank of San Francisco and Welch & Company, two of the beneficiaries under the third mortgage, by telegram to the Court requested the appointment of a receiver with power to operate as prayed for in said petition.

III.

Attached to the petition of plaintiffs for the appointment of a receiver, and presented to the Court at the time of such appointment, are the affidavits of John C. Ainsworth, President of United States National Bank of Portland, William J. Patterson, Cashier and Manager of Hayes & Hayes, Bankers, of Aberdeen, H. D. Langille, Almerion P. Stockwell and George B. Perry. These affidavits were also offered and read in evidence at the time of the hearing on the petition of the intervenors.

IV.

The affidavits above referred to, in so far as material, are as follows:

Affidavit of John C. Ainsworth.

I am president of United States National Bank of Portland, Oregon, a creditor of S. E. Slade Lumber Company in excess of \$25,000. We, together with other creditors aggregating in excess of \$500,000, are secured by a third mortgage made by S. E. Slade Lumber Company to First Federal Trust Company

and Milton R. Clark, Trustees, on June 2, 1915. I have investigated and am familiar with the financial condition of Slade Lumber Company, and [210] am satisfied that the Lumber Company is unable at the present time to pay its debts as they mature, and that if the properties of the Lumber Company are forced to sale at the present time they would not bring enough to pay the debts of the company. From my investigation I am satisfied that the appointment of a receiver with power to operate will be a beneficial thing both for the Lumber Company and for its secured creditors, and that the operation of the property by a receiver, under the orders and directions of the Court, will afford the best possible means to furnish money with which to prevent waste and undue deterioration of the property, and to put and maintain the same in such condition that it can bring as nearly as possible its full value when sold, and will furnish moneys to pay taxes and insurance premiums and other incidental charges, and will furnish considerable money for the diminution and extinguishment of the debt secured under the first and second mortgages and thereafter of the third mortgage. I know of no other method under which the property of the Lumber Company can be kept in condition and its debts extinguished, and no other method has been presented by which there is any possibility of saving an equity for the Slade Company. I am informed and believe that S. E. Slade Lumber Company owes, exclusive of interest, approximately \$1,200,000, and that creditors holding approximately \$950,000 in principal amount join in the request for

the appointment of a receiver with power to operate as prayed for.

Affidavit of William J. Patterson.

I reside in Aberdeen, in the State of Washington, and am cashier and manager of Hayes & Hayes, Bankers, and have been such for a great many years. I am intimately acquainted with the various business activities of Grays Harbor County and have had an intimate knowledge of the affairs of the S. E. Slade Lumber [211] Company since it began business in Aberdeen, and know its financial condition at the present time. I am well acquainted with its timber and other lands. In my opinion it is absolutely necessary for the preservation of the property and to prevent the waste and deterioration of the same, that a receiver of the property described in the mortgage be appointed, with power to conduct such operations as will enable the Lumber Company to have its timber lands logged and lumbered and the proceeds applied to the payment of taxes, insurance premiums and other incidental charges, and to the extinguishment of the debts of the company. In no other way than by a logging operation conducted on the timber lands of the company, can the Lumber Company ever raise sufficient moneys to pay the debts due from it to its creditors, and if such operations are not commenced and conducted immediately the property of the company will so deteriorate in value as to be insufficient to pay the debts due from the company. The valuable mill property of the company is, because of insufficient care and attention, due to lack of funds, daily deteriorating in value and being

wasted, and unless something is done immediately for the preservation and upkeep of the mill property it will soon lose the greater part of its value. The Slade Lumber Company is in my opinion insolvent in the sense that it cannot meet its debts as they accrue, and if the property of the Lumber Company is forced to sale at the present time it will not bring sufficient to pay the Lumber Company's debts. In my opinion the appointment of a receiver as prayed for, is the most advantageous plan to adequately conserve the properties of the Lumber Company, protect its creditors and save to the Lumber Company an equity after the debts have been paid. My bank is not a creditor.

Affidavit of H. D. Langile.

I am and have been a resident of Portland, Oregon, for eleven years and during that time have been actively engaged in the [212] timber business, operating chiefly in the States of Oregon and Washington. For five years prior to that time I was connected with the Forestry Service of the United States. I am familiar with timber cruising and with large timber bodies situated in Oregon and Washington, and have been familiar with the timber business in said States, in all of its phases, for the last eleven years. I have been in touch with the large transfers of timber property which have taken place in said States during that time, and am familiar with the logging and lumbering trades and with the timber market in said territory. The present timber market is characterized by a very general desire on the part of owners to sell and little inclination on

the part of capital to buy. Large tracts of timber can now be bought at prices substantially identical with those paid in 1906 and 1907, and I am familiar with many tracts which are now offered at prices much lower than those quoted prior to the recent depression. A number of economic factors have developed which bear directly upon the salability of timber. My experience and judgment impel me to say that fir stumpage at \$3 per M cannot be sold to speculators or investors. Stumpage at that price allows no margin of profit for a speculator, in view of the ordinary price which fir lumber commands. There is much timber that may be acquired by undertaking to pay for it as it is cut. The competition of today in the timber market is between sellers rather than buyers. I am very familiar with the timber holdings of S. E. Slade Lumber Company known as the Stanton Tract, and in my opinion such holdings must be sold to loggers or mill operators, if at all, and I am of the opinion that the value of said tract cannot be secured for the owners, under present conditions, except but cutting and marketing the same. I further believe, as a result of my own efforts to sell the property, that it must be sold on such terms as would enable the purchaser to pay for it out of the proceeds derived from its sale as logs and lumber. [213]

Affidavit of Almerion P. Stockwell.

I have lived in the city of Aberdeen for upward of twenty years and am intimately acquainted with the various timber holdings around Aberdeen, in-

cluding the timber holdings in Township 21, North of Range 9 West, and with the timber lands described in the first mortgage. In the year 1912 the Warren Company was engaged in logging the timber lands of the Lumber Company covered by the mortgage, and I had charge of such logging operations for the Warren Company. By reason of the fact that the Warren Company failed to perform its contract obligations the logging operations were not cleaned up in a proper manner and there is constantly a very decided danger of great loss to the timber by forest fires; that if such a fire ever started in the mortgaged property it would cause irreparable injury and damage thereto because of the condition of the logged over places in the property and because no fire patrol is kept. Because of such conditions there is imminent danger of such a fire unless the customary precautions are taken to prevent same. The danger of fire to the mortgaged property is increased by the fact that in the immediate neighborhood thereof there is a large quantity of logged off lands and because of the fact that several logging operations are now being and have lately been conducted in the immediate neighborhood of said mortgaged property. It is entirely possible to greatly minimize any danger by fire by the employment on the property of a force of men engaged in logging same, on account of the safeguards necessary to be taken by the logger to protect himself and his men and equipment. I am well acquainted with the affairs of the Slade Lumber Company and with the condition of its mill property. Said property is valuable, but is daily

deteriorating in value and wasting, because of the inability and failure of the Lumber Company to care for it. At the present time there are in the neighborhood of twelve million feet of fir logs which [214] have been cut and bucked and which now lie in the woods and have not been moved on account of the financial inability of the Lumber Company to move them. These logs represent a value where they lie of approximately \$70,000. These logs are daily deteriorating in value and will soon be of no value unless they can be removed from the woods and sold. Said logs also constitute an extraordinary fire risk and are subject to be destroyed by any fire. The skidroads which have been constructed upon the property and the moneys which have heretofore been spent in opening up the property so that it could be properly logged, will be entirely lost unless steps are immediately taken to conduct logging operations upon said lands. By far the largest asset of the Lumber Company is its timber lands and there is no way in which the value of said lands can be obtained therefrom, except by a logging operation.

Affidavit of George B. Perry.

I am and for many years past have been an attorney for Detroit Trust Company. In July, 1916, I visited the city of San Francisco for the purpose of protecting the debts due under the first and second mortgages. I investigated the affairs of the S. E. Slade Lumber Company and became familiar with its affairs, and for the purpose of protecting S. E. Slade Lumber Company and its various creditors' plans were devised for the appointment of George

L. McPherson as receiver and for the operation of the property by said receiver. It is within my personal knowledge that the appointment of such receiver, with power to operate, is desired by the following creditors of S. E. Slade Lumber Company:

Detroit Trust Company and Alexander McPherson, Trustees, Detroit Trust Company, American National Bank of San Francisco, California, Welch & Company of San Francisco, California, United States National Bank of Portland, Oregon, Hump-tulips Logging Company of Aberdeen, Washington and S. E. Slade. [215]

The claims of said creditors aggregate approximately \$950,000 of indebtedness and constitutes five-sixths of all of the debts of the Slade Lumber Company.

V.

In addition to the aforesaid affidavits the following evidence and affidavits were offered and introduced in evidence at the hearing. Said affidavits, in so far as they are material, are as follows:

Affidavit of S. E. Slade.

I am president of S. E. Slade Lumber Company, a California corporation, and was such when the first mortgage was made and have been such president ever since. The third mortgage given by S. E. Slade Lumber Company has not been declared in default by the trustees or by any other person, and no specification in writing of any default has ever been delivered to First Federal Trust Company of San Francisco, in accordance with the terms of said third mortgage or otherwise. Prior to the 2d day

of June, 1915, and ever since that date I have, with the knowledge and consent of the creditors secured by the third mortgage, been attempting, in behalf of the Slade Lumber Company, through timber brokers and otherwise, to sell all of our timber lands situated in Township 21, North of Range 9 West, Willamette Meridian, in Grays Harbor County, State of Washington, for \$1,250,000, which price is substantially on the basis of \$2.35 per M feet, board measure, for all the timber on said lands, being the same lands described in the first, second and third mortgages respectively; but neither the said S. E. Slade Lumber Company, nor have I on its behalf, been able to obtain a purchaser for said timber lands at the price aforesaid. I am well acquainted with the values of timber lands in the locality aforesaid and I verily believe that the only method by which a fair value of said timber lands can be realized is to cut the timber and log the same, and [216] that under the contract entered into between George L. McPherson as receiver and Humptulips Logging Company there will be realized for the creditors of Slade Lumber Company a price of not less than \$3 per M feet, board measure, for all the timber on said lands. According to my best information, knowledge and belief, said contract is a fair contract and the only means by or under which all of the creditors of the lumber company can be paid and any possible equity in said lands saved for S. E. Slade Lumber Company. Neither I nor S. E. Slade Lumber Company, nor any person or persons who are stockholders of said Lumber

Company, have now or ever had at any time, either directly or indirectly, any shares of the capital stock of or any interest in said Humptulips Logging Company. Neither I nor any officer of S. E. Slade Lumber Company is now or has been, at any time an officer of Humptulips Logging Company, except that H. P. Brown, now president of Humptulips Logging Company, did from about the month of March, 1914, until the 26th of May, 1916, hold in his name one share of the capital stock of S. E. Slade Lumber Company, which was placed in the name of said Brown by myself to qualify the said Brown as a director in Slade Lumber Company, which office of director said Brown held from March, 1914, until May 26, 1916, at which time his resignation as director was accepted and his stock transferred. Said H. P. Brown never at any time had any substantial interest in said S. E. Slade Lumber Company and has not now any interest therein. During the time the said H. P. Brown held one share of stock in the Lumber Company, he acted as director and vice-president of said S. E. Slade Lumber Company at the request of the trustees under the third mortgage, and not otherwise. W. B. Mack and C. A. Pitchford, or either of them, never were nor are they now stockholders in S. E. Slade Lumber Company, or own or have any interest therein. [217]

**Second Affidavit of John C. Ainsworth, President of
United States National Bank of Portland,
Oregon.**

The indebtedness of S. E. Slade Lumber Company secured under the third mortgage, due the bank which

I represent, figured to the 18th day of August, 1916, is the sum of \$30,627.95. I am familiar with the contract executed by the receiver with Humptulips Logging Company. In my opinion said contract is a just and equitable contract from the standpoint of the S. E. Slade Lumber Company and its creditors, and it is largely to the interest of the creditors of the Lumber Company, and particularly the creditors secured by the third mortgage, that the receiver be permitted to carry out said contract. I am of the opinion that the properties of the Lumber Company are more than adequate to the payment of its debts and if full value can be secured for said properties there will be a considerable equity for the Lumber Company after all of its indebtedness has been paid. I am of the opinion that it will not be necessary to pay all of the debts of S. E. Slade Lumber Company from the revenues derived from the logging operations contemplated in the logging contract which has been entered into. I am of the opinion that within two years from this time, if the contract is carried out in accordance with its terms, the indebtedness of the S. E. Slade Lumber Company will be so materially reduced and the position of the Lumber Company so largely improved that it will be possible to re-finance the obligations of the Lumber Company and provide for the liquidation of all of its indebtedness. I am further of the opinion that before said two years period has expired, the logging operations contemplated in said contract will demonstrate the value of the properties of the Lumber Company to such an extent as to make possible the sale of said properties

at a price more than adequate for the payment of the indebtedness of the Lumber Company. [218] It is plainly to the interest of all the creditors of the Lumber Company that its dead assets, consisting of timber lands, be converted into live and liquid assets, and that a fund be thereby provided for the payment of taxes and maintenance charges, and it is also to the interest of the creditors secured under the third mortgage that moneys secured through a logging operation shall be applied in reduction of the indebtedness secured by the first and second mortgages on the property. I am of the opinion that the contract with Humptulips Logging Company amply protects the receiver, the defendant S. E. Slade Lumber Company and the creditors of said Lumber Company, and does not permit the Humptulips Logging Company or anyone else to over-reach the receiver or the beneficiaries of the estate.

Affidavit of D. B. Fuller.

I am vice-president of American National Bank of San Francisco, which bank is a creditor of S. E. Slade Lumber Company in excess of \$100,000, and which indebtedness is secured under the third mortgage. I believe it will be for the best interests of all the creditors of the Lumber Company, and more particularly for the interest of all the creditors secured by the third mortgage, that the timber lands of the Lumber Company be cut and logged. I am acquainted with the logging contract which has been entered into by the receiver, and in my opinion said contract is a fair and reasonable contract, and that

it will be to the best interests of all the creditors that the contract be kept in force and carried out.

Affidavit of A. P. Welch.

I am president of Welch & Company, a California corporation having its principal place of business in San Francisco. My company is a creditor of S. E. Slade Lumber Company in excess of \$100,000, secured under the third mortgage. (In other respects the affidavit is substantially the same as the affidavit of D. B. Fuller.) [219]

Affidavit of C. B. Wells.

I am president of Slade-Wells Logging Company, a California corporation with its principal place of business in San Francisco. The corporation which I represent is a creditor of S. E. Slade Lumber Company in a sum in excess of \$35,000, secured under the third mortgage.

(In other respects the affidavit is substantially the same as the affidavit of D. B. Fuller aforesaid.)

Affidavit of C. M. Weatherwax.

I am and for many years past have been a resident of the city of Aberdeen and president and manager of Aberdeen Lumber & Shingle Company, a corporation of Aberdeen, which company now is and for many years past has been engaged in the logging and lumbering business in Grays Harbor County. I am familiar with timber lands and the values thereof in said county, and I have been and now am individually the owner of large tracts of timber in said county, and for many years was actively engaged in the logging business. I am very familiar with the timber

lands of the Slade Lumber Company covered by the first mortgage, and my company a number of years ago was part owner of said timber. My company now owns in the immediate neighborhood of said timber a large quantity of timber lands, which under my supervision and control is now being logged into the Humptulips River, and consigned to the public service corporations operating thereon. The Humptulips River is and for upward of twenty years has been one of the most extensive logging and driving streams in Grays Harbor County, and said river is the only outlet for the timber lands of the Slade Lumber Company. In my opinion the sum of \$3 per M feet stumpage is the full market value of the timber lands of the Slade Lumber Company, and if the Slade Lumber Company, the [220] the receiver and the creditors realize \$3 per M feet stumpage on said timber, they will realize a very high stumpage value therefor. In my opinion \$3 per M feet stumpage is as much as any logger can possibly afford to pay for said timber. I have examined and am familiar with the terms of the logging contract entered into between the receiver and Humptulips Logging Company, and in my opinion said logging contract is a very fair and profitable contract for the receiver and for the estate, and by means of said contract the receiver and the estate will realize the full stumpage value of said timber, and such value can only be secured by the logging of the timber under a contract such as has been entered into. Said contract does not permit any undue and unreasonable profits and gains to the Humptulips Logging Company, and considering the

obligation of the Logging Company to finance the logging operations, the depreciation on its equipment, the interest on its investment, its logging expense and other charges not included in logging expense under the contract, the fluctuating market value of logs on Grays Harbor and the risks which the Logging Company must take under said contract, the compensation up to \$1 to be paid to the Logging Company, provided the logs sell for sufficient to pay said \$1 or any part thereof, is a very reasonable compensation to be paid to the Logging Company. Under the terms of the contract, if any profit over and above the \$1 is realized, said profit must be paid to the receiver, and in my opinion such provision is more favorable to the receiver and to the owner of the timber lands than the ordinary and usual contracts of like nature entered into in the past by loggers in Grays Harbor County. In all contracts between an owner of timber and a logger, for the logging of timber, the logger always figures on making the sum of \$1 per M feet over and above all expenses and after paying the stumpage value to the owner as agreed upon, and such \$1 per M is the customary [221] and usual profit which a logger expects to make. In my opinion the only method by which the Slade Lumber Company or its creditors will realize the full value of the timber lands, will be by a contract such as has been entered into, and I am of the opinion that if said logging contract is continued, and the timber is logged and brought to market thereunder, it is reasonable to expect that said timber lands after two or three years of operation can be advantageously sold as a going con-

cern. I am of the opinion that said contract amply protects the Receiver, the Lumber Company and its creditors and does not permit the Humptulips Logging Company to over-reach the receiver in any way.

Affidavit of A. L. Paine.

I am and for many years past have been the manager of National Lumber & Manufacturing Company, formerly the National Lumber & Box Company, a corporation engaged in the logging and lumbering business, with offices at Hoquiam, in Grays Harbor County. My company now is and for many years past has been engaged in the logging of its timber under my conduct and management. I am well acquainted with timber lands in Grays Harbor County and with the values thereof and some years ago was part owner of a large tract of timber tributary to the Humptulips River and in the immediate vicinity of the Slade timber. We logged this timber into the Humptulips River. I am well acquainted with the timber lands of the Slade Lumber Company covered by the mortgage and with the value thereof. I am acquainted with the ordinary and usual provisions contained in logging contracts and am familiar with the terms upon which loggers ordinarily are willing to log timber lands for the owners thereof.

(In other respects the affidavit of A. L. Paine is substantially the same as the affidavit of C. M. Weatherwax.) [222]

Affidavit of William Corkery.

I am and for many years past have been a resident of Aberdeen and for sixteen years past have been engaged in the logging business in Grays Harbor

County, and for the past seven years have been engaged in the logging of timber on my own account, and for the last three and one-half years have been logging timber into the Humptulips River. I am acquainted with the timber lands in Grays Harbor County and the values thereof, and am acquainted with the timber lands of the Slade Lumber Company covered by the mortgage. The only outlet to said timber is the Humptulips River, which stream has for upward of fifteen years been one of the most extensive logging and driving streams in Grays Harbor County. In my opinion the sum of \$3 per M feet stumpage is the full market value of the timber lands of the Slade Lumber Company, and any logging contract which returns to the owner of said timber the sum of \$3 per M feet stumpage on all logs, will insure to the owner the full market value of the timber, which can only be secured by means of a logging contract. I have examined and am familiar with the terms of the logging contract made by the receiver, and in my opinion said contract is a fair and reasonable contract from the receiver's standpoint, and said contract does not permit of any undue or unreasonable gains and profits to the Humptulips Logging Company. In my opinion said contract is particularly favorable to the receiver for the reason that after the logging expense and a sum up to \$1 is paid to the Humptulips Logging Company out of the sale of logs, after the stumpage of \$3 per M is first paid to the receiver, the balance, if any, must be paid to the receiver; in my opinion such profit last described

ordinarily goes to the logger and the logger is entitled to such profit. [223]

Affidavit of O. P. Burrows.

Since 1890 I have lived in Grays Harbor County and am very familiar with the Humptulips River and have lived on lands adjoining said river for sixteen years and have owned timber lands tributary to said river for the same period of time. Said river is and for the past twenty years has been one of the most extensive and successful log-driving streams in Grays Harbor County. In the past I have done considerable logging on the river and am well acquainted with the timber lands adjacent to and in the vicinity of the Humptulips River, and with the values thereof, and have been purchasing agent for others of timber in that locality of approximately 30,000 acres. I am well acquainted with the timber lands of the Slade Lumber Company covered by the mortgage, and with the value thereof, and in my opinion any logging contract covering said timber, which inures to the owner thereof stumpage at the rate of \$3 per M feet for all timber removed, will insure to the owner the full market value of said timber, and such value can at the present time only be realized for said timber by a logging contract. Under the contract which has been entered into by the receiver, all the risks of a fluctuating log market and other things are taken by the Logging Company, and the receiver is assured under any and all circumstances the full market value of the timber lands, and in addition thereto is insured the benefits of a rising log market. Knowing the amount of the indebtedness of the Slade Lumber Company

and its financial condition and the inability to sell its timber lands for an amount sufficient to pay up its obligations, I consider the logging contract which has been entered into a very beneficial contract for the receiver, the creditors and the owner, and only by means of a logging contract can any equity be possibly saved for the S. E. Slade Lumber Company.

(In other respects the affidavit of Mr. Burrows was substantially the same as the affidavit of William Corkery.) [224]

Affidavit of Eugene France.

I am and for many years past have been a resident of Aberdeen and during all said time have been the owner of extensive timber lands in Grays Harbor County, and during all said time have been and now am familiar with the values of such timber lands. I am familiar with the Humptulips River and with the timber lands tributary thereto and with the values thereof and have been familiar therewith for a good many years. For a long number of years and until recently I was part owner of what is known as the France and Lowe tract of timber, containing about 800 million feet, which timber lies to the east of and in close proximity to the timber lands of the Slade Lumber Company in Township 21, North of Range 9 West. For many years last past I have been interested in various logging operations and am familiar with logging contracts and the cost of logging operations. I am and for many years past have been familiar with the timber lands of the Slade Lumber Company and with the value thereof, and in my opinion any logging contract covering said timber

which returns to the owner stumpage at the rate of \$3 per M feet for all timber to be removed, would result in the owner of such timber receiving the full market value thereof.

Second Affidavit of W. J. Patterson.

I am and for many years past have been connected with logging and lumbering interests in Grays Harbor County, and individually have been and now am the owner of timber lands in said county. I am well acquainted with timber values, including the lands of the Slade Lumber Company. Personally, I have been and now am interested in various logging operations and am familiar with logging contracts and the cost of logging operations and with the market price of logs from time to time on Grays Harbor. In my opinion the Slade timber cannot be sold in the open market on the basis of \$3 per M feet [225] stumpage and only by a logging contract can any such value be realized. Any logging contract which would return to the Slade Lumber Company stumpage at the rate of \$3 per M feet for all timber to be removed, would pay to the owner the full market value of said timber. I have read and am familiar with the logging contract entered into by the receiver, and in my opinion said logging contract is a first-class contract for the receiver and the creditors of the Lumber Company. The contract does not permit any undue gains or profits to the Humptulips Logging Co., and the compensation therein provided is not more than a reasonable compensation to be allowed to the Logging Company. Said contract is particularly favorable to the receiver because he is entitled to all moneys

over and above the cost of operation and the compensation to the Logging Company, which moneys ordinarily go to the logger and which he is entitled to. In my opinion, it will be to the best interests of all the creditors of the Slade Lumber Company and to the Lumber Company itself that said contract be kept in force and carried out. I believe that if logging operations are conducted under said contract for a period of two or three years, the indebtedness of the S. E. Slade Lumber Company will be so materially reduced and the advantages of said timber lands and the operations thereunder as a going concern be made so apparent that it will be possible for the Lumber Company either to refinance its obligations or make possible the sale of its properties at a price more than adequate to pay the indebtedness of the Lumber Company and leave an equity for it.

The financial condition of Humptulips Logging Company is sound and said company is amply able to carry out the terms and conditions of said contract according to its terms. [226]

Affidavit of W. B. Mack.

I am and for many years past have been a resident of Aberdeen, engaged in the logging and lumbering business. For the past fourteen years and up to the 1st day of June, 1916, I was the manager of S. E. Slade Lumber Company and in charge of its logging and lumbering operations in Grays Harbor County. I have had extensive experience in the logging of timber lands and am well acquainted with timber lands in Grays Harbor County and the values thereof, and more particularly with the timber lands of the

Slade Lumber Company and their values, tributary to the Humptulips River. The only outlet to market for the timber lands of the S. E. Slade Lumber Company is the Humptulips River, which now is and for upward of twenty years past has been one of the most extensive and successful logging and driving streams in Grays Harbor County. While I was manager of the Lumber Company and a short time prior to July 12, 1910, the timber lands of the Lumber Company were thoroughly cruised by J. D. Lacey & Company, reputable timber cruisers of Portland, Oregon, which cruise disclosed over 632 million feet of merchantable timber on the lands of the Lumber Company. Since said time, some of the timber has been logged, but after the logging operations had ceased the timber was rechecked by J. D. Lacey & Company and it was found that there remained on said timber lands and now are thereon 532 million feet of merchantable timber. Within the last two and one-half years I made many earnest attempts to sell these timber lands for \$1,250,000, or on the basis of \$2.35 per M feet of merchantable timber on said lands. These lands were also placed in the hands of J. D. Lacey & Company, timber brokers of Portland, Oregon, for sale at said figure, but it has been impossible to sell said lands. In my [227] opinion the sum of \$3 per M feet stumpage is the full market value of said timber, and if the receiver realizes the sum of \$3 per M feet stumpage for said timber, he will realize the full market value thereof. Prior to the foreclosure of the mortgage by Detroit Trust Company and shortly after the operations of the Warren Company ceased

in the summer of the year 1914, I, as manager of the Lumber Company, attempted to enter into a logging contract with certain reputable loggers of Grays Harbor, covering said timber, and the very best terms upon which said loggers would agree to enter into a logging contract, was to log said timber upon the basis of dividing the gross proceeds of the sale of logs on a basis of 50% to the S. E. Slade Lumber Company and 50% to the logger, the Slade Company, however, to pay the driving, booming and towing charges of \$1.25 per M out of its 50%; that such division, considering the market value of logs on Grays Harbor during the past several years, would have realized to the Slade Lumber Company considerably less than \$3 per M feet stumpage. I have read and am familiar with the logging contract entered into by the receiver, and in my opinion said contract is a very fair and reasonable one from the standpoint of the receiver and the creditors, for the following reasons:

A. Out of the proceeds of the sale of logs the receiver is paid first \$3 per M. feet stumpage, which is the full market value of the timber.

B. By no other means can the sum of \$3 per M feet stumpage be realized for said timber, and by means of this logging contract all of the obligations of the Lumber Company will be paid and leave an equity for the Lumber Company.

C. Under said contract the Logging Company furnishes its full logging equipment, which cost on the ground, as affiant is informed and believes, approximately \$150,000; the Logging [228] Com-

pany is obliged to finance the operations, must stand the interest on its investment and the depreciation on its dams, engines, camps, and other equipment, and the loss, if any, on any mill paper taken by it on account of the sale of logs, and is paid its logging expense and compensation out of the sale of logs after the receiver has first been paid \$3 per M, and then only if the funds in the hands of the receiver are sufficient to pay such logging expense and compensation. In my opinion, in view of these things and the fluctuating price of logs on Grays Harbor and the other risks the Logging Company must take under the contract, a sum up to \$1 per M as compensation to the Logging Company is a very reasonable compensation to be paid it under said contract.

D. Because the balance, if any, after stumpage to the receiver, logging expense and compensation to the logger has been paid, goes to the receiver. In all contracts of which I have any knowledge, the entire profit over and above the market value of the stumpage is retained by the logger. Every logger expects to make \$1 per M over and above all expenses, and such sum is the usual and customary profit.

In my opinion the contract entered into amply protects the receiver, the Lumber Company and its creditors. I am not now and never have been a stockholder in S. E. Slade Lumber Company, and since I resigned as manager have had no connection with or any interest in the Lumber Company whatsoever. Ever since the incorporation of Humptulips Logging Company I have been and now am a nominal director in said company, holding one share of stock, and the

position of vice-president. I have never owned, nor do I now own, either directly or indirectly, any interest in the Logging Company, and I have never been nor am I now an employee of said Company, and I have been and now am acting in the capacity of trustee and vice-president purely as a matter of accommodation. [229]

Second Affidavit of Almerion P. Stockwell.

I incorporated Humptulips Driving Company, a public service corporation operating on the Humptulips River, in 1899, and owned and operated the same until 1910, when I sold the company to Warren Company. I owned Grays Harbor Boom Company, a public service corporation operating on the Humptulips River, from 1897 to 1910, when I sold it to the Warren Company. I managed the Boom and Driving Company for the Warren Company and when the latter company sold to Humptulips Logging Company I operated and now am operating said companies for said Logging Company. Since 1897 I have been logging practically continuously on the Humptulips River, logging my own timber and also managing the operations of other companies. I am intimately acquainted with logging operations and the cost thereof. I own and for many years past have owned a large tract of timber tributary to the Humptulips River and in the vicinity of the Slade timber, and am acquainted with the market value of the Slade timber and of timber lands in general. In my opinion any logging contract covering the Slade lands, which assures to the owner thereof stumpage at the rate of \$3 per M feet for all

logs removed, assures to the owner the full market value of said timber, and such value cannot at the present time be realized from a sale of such timber, but only by a logging contract. I have examined the logging contract made by the Receiver and in my opinion it is a fair and reasonable contract from the receiver's standpoint. (The reasons given by affiant for his opinion are substantially the same as the reasons given in the affidavit of W. B. Mack heretofore set out.) Under the contract the receiver is assured on a low log market the full market value of the timber, and at the same time it gives him the benefit of a rising log market; for example, the logs sold by Warren Company to Humptulips Logging [230] Company brought on the 1914 and 1915 market, after deducting the carrying charges, an average price of \$6.72 per thousand. Using these figures to illustrate the present contract, the Humptulips Logging Company, after paying \$3 to the receiver and paying the estimated cost of logging expense, would have made an apparent profit of 12¢ per M. At the present market the Logging Company would receive its full \$1 per M and the receiver would also receive considerable moneys over and above the \$3 stumpage. In my opinion the contract in question amply protects the receiver, the defendant Lumber Company and its creditors. There have been a number of fires in the vicinity of the Slade lands and as late as the year 1915 there was a fire in Section 23, which would have destroyed all the felled timber of the Slade Lumber Company had it not been for the fact that a crew of the Logging Company happened

to be in that vicinity and were able to put out the fire; at that time a number of logs belonging to Cameron & Hoover Logging Co. were destroyed. Said timber lands are not in any well defined fog belt, but such fogs and rains as there are practically cover the entire western part of the State of Washington. In Township 22, North of Range 9 West, there was an extensive forest fire which burned approximately 200,000 acres of timber. The Grays Harbor Boom Co. and the Humptulips Driving Co. are public service corporations and the customary and public charge of said companies and of Humptulips Towing Co. for timber, taking the rate as the Slade timber, is \$1.25 per M. I was manager of Warren Company from April, 1912, until May or June, 1914, when the Warren Co. ceased operations, and I am intimately familiar with the affairs of the Warren Co. during that period. In May, 1914, at a meeting held in the city of Seattle, at which a majority of the stockholders and board of trustees of Warren Co. were represented, the first plan was to cease operations and to permit the company [231] to go into the hands of a receiver and to leave its various creditors, including its laborers, to be paid through receiver proceedings. After further discussion it was decided that Warren Company would turn over all of its assets to any responsible person who would agree to pay off the indebtedness of the Warren Company and release it from its contracts, excepting therefrom, however, indebtedness to stockholders for moneys advanced, and at my request a written option was given by the War-

ren Company to me, which option contained the same terms and provisions as contained in the formal option which was later made to the S. E. Slade Lumber Company. I was unable to handle said option, and said option was also attempted to be handled by J. B. Bridges of Aberdeen, but without success, and thereafter I gratuitously turned said option over to S. E. Slade Lumber Co., and thereupon a formal written option was made by Warren Co. to S. E. Slade Lumber Co. Ever since the incorporation of Humptulips Logging Co. I have been and now am the manager of said company and will have charge of the operations of said company under the contract made by it with the receiver. Immediately after said contract was entered into, operations thereunder were begun and are now being conducted. The logging equipment, dams, skidroads, tools, camps and other personal property purchased from Warren Co. by Humptulips Logging Co. cost on the ground approximately \$150,000, and all of said equipment has been kept and is now in good repair and in first-class workable condition. I have personally cruised a great deal of the Slade timber and I believe that the timber as it now stands will cruise over 500 million feet of merchantable timber.

[232]

Affidavit of H. P. Brown.

Ever since the incorporation of Humptulips Logging Co. I have been and now am the president and sole stockholder of said corporation. Neither S. E. Slade nor S. E. Slade Lumber Company, nor any stockholder of S. E. Slade Lumber Co., has now or at

any time ever had, either directly or indirectly, any interest in Humptulips Logging Co. or in the stock of said company, and neither S. E. Slade, nor any officer of the Slade Lumber Company has been at any time nor now is an officer of Humptulips Logging Co. From about the month of March, 1914, until the 26th day of May, 1916, I was a director of S. E. Slade Lumber Co., holding one share of stock. On May 26, 1916, I resigned as director and transferred the share of stock aforesaid. During said period I also acted as vice-president of the company. In the month of May, 1915, I tendered my resignation as director and vice-president to the Slade Lumber Co., but the resignation was not accepted because the trustees under the third mortgage requested me to continue to act as director and vice-president, and I did so for that reason. Prior to May, 1915, and from about the month of March, 1914, I held an option from S. E. Slade, giving me the right to buy \$100,000 worth of stock at par in the Slade Lumber Company. This option ran for a period of one year, and I became a director and vice-president of the company for the purpose of familiarizing myself with its financial and business conditions. I never exercised the option and the only interest I ever had in S. E. Slade Lumber Co. was as aforesaid.

Humptulips Logging Co. was incorporated on the 15th day of July, 1914, and its Articles filed on the 16th day of July, 1914, the incorporators being myself, W. B. Mack and C. A. Pitchford. The capital stock of the company is \$100,000, of which I sub-

scribed \$99,800, and W. B. Mack and C. A. Pitchford each subscribed \$100. The said Mack and the said Pitchford acted as incorporators of the [233] company as a matter of accommodation to me, and their subscriptions to the capital stock of the company were paid for by me. The said Mack ever since the incorporation of the company has been and now is the vice-president and a director, but the said Mack at no time had nor has he now, either directly or indirectly, any interest in the company. At the time of the incorporation of the company the said C. A. Pitchford was an employee of S. E. Slade Lumber Company, working on a salary in the occupation of scaler, which position I secured for him. Mr. Pitchford is a close friend of my family and immediately after the incorporation of Humptulips Logging Co. he became an employee of said company and ever since has been in its employ, acting in the capacity of secretary and treasurer. The said Pitchford never was an officer of S. E. Slade Lumber Co. and never had any interest in that company whatsoever.

After the option from Warren Company, dated June 19, 1914, had been made and delivered to S. E. Slade Lumber Co., the latter company attempted to finance said option through various parties, and more particularly through the First National Bank of San Francisco, and I was present at the time the application was made to said bank. The First National Bank of San Francisco not only refused to finance said option for the Slade Lumber Company, but stated that it would not give its consent to said

company taking on any further financial obligations, the said Slade Lumber Co. being at that time heavily indebted to First National Bank of San Francisco. While S. E. Slade Lumber Co. was attempting to finance said option it became imperative to pay off the labor liens which had been filed against the logs of the Warren Co., and S. E. Slade personally borrowed the sum of \$20,000 for the purpose of paying off said labor liens, and which liens were in June, 1914, paid off. The S. E. Slade Lumber Co. and S. E. Slade were entirely unable to finance said option or to do anything [234] with it, and thereupon on the 1st day of July, 1914, the Slade Lumber Co. assigned to me the option of June 19, 1914, made by the Warren Co. to the Slade Lumber Co., in consideration of the repayment by me to S. E. Slade of the sum of \$20,000 borrowed by Mr. Slade to pay off the labor liens, and I repaid said sum of \$20,000 to Mr. Slade. Thereafter and on the 15th day of July, 1914, I organized Humptulips Logging Company and caused said option so assigned to me to be assigned to said company, which company thereby became the owner thereof and exercised and carried out the terms and conditions of said option. After the assignment of said option to me by S. E. Slade Lumber Co., neither the latter nor S. E. Slade have had nor have they now, either directly or indirectly, any interest in said option or in the property covered thereby, or in the assets transferred by Warren Co. to Humptulips Logging Co.

At the time Warren Co. ceased operations it had failed to pay to S. E. Slade Lumber Co. two monthly

payments of \$12,500 each, according to the terms of its contract, and said contract further provided for the sum of \$50,000 as liquidated damages for breach of the contract. At the same time Warren Co. had paid to S. E. Slade Lumber Co., in the way of monthly advances, approximately the sum of \$150,000, for which the Warren Co. had received no value, and the Slade Lumber Co. was fearful that under the terms of the contract with the Warren Co. the latter company could recover said sum of \$150,000 paid to the Slade Lumber Co. as aforesaid, and the said S. E. Slade Lumber Co. held as an offset against this amount the sum of \$50,000 liquidated damages and the sum of \$25,000, two monthly advances unpaid by the Warren Co. At the time the negotiations between Warren Co. and Hump-tulips Logging Co. were concluded and the assets transferred, releases were exchanged between Warren Co. and S. E. Slade Lumber Co., the [235] S. E. Slade Lumber Co. relieving the Warren Co. from any claims the said Lumber Co. might have against the Warren Co., and the Warren Co. releasing the S. E. Slade Lumber Co. from any claims of the Warren Co. Said exchange of releases were procured by affiant. On the 12th day of August, 1914, S. E. Slade Lumber Co. formally cancelled the so-called Warren Co. contract. At the time of the transfer of the assets of the Warren Co. to Humptulips Logging Co. it was necessary for Humptulips Logging Co. to procure for one W. T. Cameron a free right of way from S. E. Slade Lumber Co. across certain of its lands, resulting in a loss to the Lumber Com-

pany of approximately \$2,000. In consideration of the free right of way granted by S. E. Slade Lumber Co. to the said Cameron, and of the formal cancellation of the Warren Co. contract, Humptulips Logging Co. executed and delivered to S. E. Slade Lumber Co. a warranty deed covering the SE. $\frac{1}{4}$ of Sec. 23 and the NE. $\frac{1}{4}$ of Sec. 26, all in Township 21, North of Range 9 West, subject to certain reservations and exceptions contained in the deed from Warren Co. to Humptulips Logging Co.

In conformity with the agreement of Humptulips Logging Co. with the Warren Co. it paid off all the creditors of the Warren Co. and performed the contracts by it assumed and agreed to be performed, and in answer to the affidavit of A. J. Morley I deny that the creditors were paid off solely from the proceeds of logs purchased from the Warren Co.

Almerion P. Stockwell ever since the incorporation of Humptulips Logging Co. has been and now is the manager of said company, as well as the manager of Humptulips Driving Co., Grays Harbor Boom Co. and Humptulips Towing Co., and said Stockwell will continue to be the manager of said company, in charge of the logging operations under the contract entered into with the receiver. [236]

In connection with the contract entered into with the receiver, by Humptulips Logging Co., and which has been attacked by First National Bank of San Francisco, it is a fact that long prior to the foreclosure suit of Detroit Trust Co. and in the early part of the year 1916, negotiations were pending between Humptulips Logging Co., represented by my-

self, and the first, second and third mortgages, with reference to the entering into of a logging contract agreeable to all parties, for the logging of the Slade timber. Some time prior to Feb. 10, 1916, I made a proposition to the committee of creditors under the third mortgage, one of said committee being a representative of the First National Bank of San Francisco, which proposition is hereto attached as Exhibit 1. Said proposition was considered by the committee, the First National Bank of San Francisco being represented by James K. Lynch, the vice-president of said bank, and thereafter said committee (James K. Lynch acting for First National Bank of San Francisco) wrote the following letter to me, a copy of which is hereto attached as Exhibit 2. At that time said committee agreed to the reasonableness of paying the Logging Co. the cost of operation, plus \$1 as compensation, and the only reason why the Logging Contract was not entered into at that time was because Detroit Trust Company would not agree to condition "C" set forth in Exhibit 2 hereto attached.

Second Affidavit of H. P. Brown.

Of the creditors secured under the third mortgage the following have been fully paid and are no longer creditors thereunder, to wit, Sudden Estate Company, R. J. Lawson, J. I. Brittain, Slade Shipping Company, Mary I. Slade, S. E. Slade as managing owner of Barkentine "Jane L. Stanford," Harriet C. Frazier Estate and Felix Santallier. [237]

At the time Humptulips Logging Co. took over the assets of Warren Co., besides the labor liens which

had been paid in full, forty-eight creditors of the Warren Co. were paid in full in cash at that time, as well also as the claim of Miner D. Crary, and substantial payments were made to the National Bank of Commerce and Big Creek Timber Co. To secure the release of W. T. Cameron and Cameron-Hoover Logging Co. running to Warren Co. on certain contracts made by the latter company, Humptulips Logging Co. assumed said contracts, by the terms of which Humptulips Logging Co. was required to and did construct for said Cameron and Cameron-Hoover Logging Co. a dam on Widow Creek, together with a skidroad, at a cost of \$10,000, and was required to and did haul approximately 16 million feet of logs for the said Cameron and Cameron-Hoover Logging Co. at a price fixed in the Warren Co. contract at 10¢ per M feet, but which services actually cost Humptulips Logging Co. the sum of 25¢ per M feet.

VI.

The receiver offered in evidence a statement of the total indebtedness due the beneficiaries under the third mortgage, figured to June 1, 1916. Said statement showed that the original indebtedness, with advances and interest, of Welch & Company, American National Bank of San Francisco, Slade-Wells Logging Company, United States National Bank of Portland and Humptulips Logging Co. amounted to \$320,018.24; that the claims of First National Bank of San Francisco, Coats-Fordney Logging Co. and Saginaw Timber Co. amounted to \$261,796.11. Said statement further showed that the total indebtedness

of the Lumber Company covered by the first, second and third mortgages amounted, with interest, on June 1, 1916, to \$1,190,814.35. [238]

VII.

At the time of the hearing there was also offered in evidence Assignment of Warren Company contract with S. E. Slade Lumber Company, dated July 31, 1912, made by Warren Company to Humptulips Logging Company. A true copy of said assignment is hereto attached as Exhibit 3. [239]

Exhibit 1, Attached to Second Affidavit of H. P. Brown—Proposition Made by H. P. Brown to Committee of Creditors.

Logging Company to receive cost plus a dollar for operation but they shall not charge in logging expense depreciation on equipment, nor for selling or for working capital.

Proceeds from log sales to be paid by buyers to Hayes & Hayes Bank at Aberdeen; they to settle each month, first with Detroit Trust Company \$3; second pay Logging Company, and third remit balance to First Federal Trust Company.

Settlements with the Logging Company to be based on the average selling price for each month. After Detroit Trust Company have been paid the full amount of their claim with interest, then the Logging Company shall be paid first, the balance to go to the First Federal Trust Company.

Logging Company to assume responsibility for their proportion of mill paper.

S. E. Slade Lumber Company to have the privilege

of stopping operation six months after contract is signed and subsequent to that date to have the privilege of stopping operations on thirty working days notice. Logging Company to have the privilege of terminating contract at any time the average selling price is too low to meet the requirements of Detroit Trust Company and pay the logging contract agreement.

The above contingent upon a satisfactory arrangement being made for the \$3.00 advance to the Detroit Trust Company.

Note: Logging Company to be endorsers of paper for full amount until Trust Co. is paid, after that only for their proportion. [240]

Exhibit 2, Attached to Second Affidavit of H. P. Brown—Letter Dated February 10, 1916, Signed by J. K. Lynch, P. E. Bowles and A. P. Welch to H. P. Brown, Esq.

THE FIRST NATIONAL BANK.
of San Francisco,

San Francisco, February 10, 1916.

H. P. Brown, Esq.,
City.

Dear Sir:

As we understand the proposition of the Humptulips Logging Company for logging the timber of the S. E. Slade Lumber Company, the Lumber Company will need the co-operation of the Detroit Trust Company in the following respects:

First: To arrange that payment of \$3.00 per thousand from the proceeds of the sales of the tim-

ber shall be received by the Trust Company in satisfaction of the requirements of the mortgage regarding payments to be made in the event of cutting of timber.

Second: So that the bonds now due and those hereafter falling due may be carried without commencing proceedings to foreclose the mortgage securing the same, so long as the logging continues.

Third: So that no foreclosure proceedings shall be commenced upon either mortgage while the logging continues.

If the co-operation of the Detroit Trust Company is obtained in these respects, we will be willing for the Lumber Company to enter into an agreement with the Humptulips Logging Company for logging its timber upon the general terms outlined by you, upon the following conditions:

(a) All of the creditors of the Lumber Company to agree to forbear bringing any suit upon their claims while the logging continues, they, in turn, to be protected against the Statute of Limitations.

(b) The Lumber Company, with the consent of the creditors, or creditors holding twenty-five per cent in amount of the indebtedness of the Lumber Company, other than that secured by the mortgages to the Detroit Trust Company, to have the right to terminate the logging contract at any time after the expiration of six months from the date of signing the contract, by giving thirty working days notice.

(c) All proceeds of log sales to be paid to Hayes & Hayes Bank at Aberdeen, they to make payment of \$3.00 per thousand to the Detroit Trust Company

and pay the Logging Company, and the balance to be paid to the First Federal Trust Company, San Francisco, for the benefit of creditors other than those whose demands are secured by the two mortgages to the Detroit Trust Company; but the interest payable to the Detroit Trust Company to be paid therefrom.

(d) The terms of the agreement for logging to be satisfactory to the creditors.

Very truly yours,

JAMES K. LYNCH,

P. E. BOWLES,

A. P. WELCH,

Treas. Welch & Co. [241]

Exhibit 3, Attached to Second Affidavit of H. P. Brown—Assignment of Contract.

ASSIGNMENT OF CONTRACT.

WARREN COMPANY, a corporation of Aberdeen, Washington, for a valuable consideration to it in hand paid by HUMPTULIPS LOGGING COMPANY, a corporation of Aberdeen, Washington, the receipt whereof is hereby acknowledged, does by these presents, assign, transfer and set over unto said Humptulips Logging Company, a corporation, and to its successors and assigns, that certain contract dated on the 31st day of July 1912, and entered into by and between S. E. Slade Lumber Company, a corporation organized under the Laws of the State of California but doing business within the State of Washington as a foreign corporation, as the party of the first part, and Warren Company, a corporation under the laws of the State of Washington, as the party of the second part; by the terms of which con-

tract the said S. E. Slade Lumber Company did give to the said Warren Company, the right and privilege of cutting, removing and marketing all of the merchantable timber located, being, standing or fallen upon the lands of the S. E. Slade Lumber Company, situated in Township 21, North of Range 9, West of the Willamette Meridian, in Chehalis County, Washington, said lands being more particularly described in said contract, and which contract contains numerous terms and conditions under or by which the said Warren Company was to log the said timber of the S. E. Slade Lumber Company, and which contract consists of eighteen typewritten pages, and the same being hereto attached and made a part of this assignment. And the said Warren Company, for said consideration, does hereby transfer and relinquish unto the said Humptulips Logging Company, a corporation, all its right, title, claim and interest in and to said contract and the whole thereof.

IN WITNESS WHEREOF, the said WARREN COMPANY has caused this instrument to be executed by its proper officers thereunto duly authorized and its corporate seal to be hereunto affixed, on this 27th day of July, 1914.

WARREN COMPANY,
By (Signed) J. B. BRIDGES,
Vice-president.

Attest: (Signed) J. F. EISWERTH,
Secretary.

State of Washington,
County of Chehalis,—ss.

On this 27th day of July, 1914, before me personally appeared J. B. Bridges and J. F. Eiswerth, to me known to be the vice-president and secretary respectively of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

(Signed) THEO. B. BRUENER,
Notary Public in and for the State of Washington,
Residing at Aberdeen. [242]

*In the District Court of the United States, for the
Western District of Washington, Southern
Division.*

No. 67-E.

DETROIT TRUST COMPANY et al.,
Plaintiffs,

vs.

S. E. SLADE LUMBER COMPANY et al.,
Defendants.

Praecipe for Additional Transcript.

To the Clerk of the Above-entitled Court:

Please include as a part of the transcript on appeal in this case the order of the Court made *sua sponte*, and entered on the 14th day of December, 1916, permitting the beneficiaries under the third mortgage to appear in this cause; also the clerk's minutes showing the exception taken to said order by the attorney for the plaintiff in open court on the 18th day of December, 1916.

WALLACE McCAMANT,

Attorneys for Plaintiffs.

BRIDGES & BRUENER,

Attorneys for Humptulips Logging Company et al.

(Filed Dec. 30th, 1916.) [243]

*In the District Court of the United States, for the
Western District of Washington, Southern
Division.*

IN EQUITY—No. 67.

DETROIT TRUST COMPANY and ALEXANDER

McPHERSON, as Trustees.

Plaintiffs,

vs.

S. E. SLADE LUMBER COMPANY, WILLIAM
T. CAMERON, CAMERON-HOOVER LOG-
GING COMPANY, HUMPTULIPS LOG-
GING COMPANY, FIRST FEDERAL
TRUST COMPANY and MILTON R.
CLARK, Trustees, SLADE-WELLS LOG-
GING COMPANY,

Defendants.

Order Allowing First National Bank of San Francisco et al., to Intervene, etc.

This cause came on further to be heard, plaintiffs appearing by Messrs. Snow, McCamant and Bronaugh, their solicitors, and the defendants S. E. Slade Lumber Company, Humptulips Logging Company, Slade-Wells Logging Company appearing by Theo. B. Bruener, and the defendants First Federal Trust Company and Milton R. Clark, trustees, appearing by Jared How and James B. Kerr, their solicitors.

And it appearing that heretofore, to wit, on the 16th day of September, 1916, a bill was filed in this court wherein First Federal Trust Company of San Francisco and Milton R. Clark as trustees were plaintiffs and said S. E. Slade Lumber Company, First National Bank of San Francisco, The American National Bank of San Francisco, Welch and Company and others were defendants, in which bill the plaintiffs therein applied for and sought the instructions of this court as to the duties of such plaintiffs as trustees under a certain mortgage or deed of trust dated June 2, 1915, executed by S. E. Slade Lumber Company to the First Federal Trust Company of San Francisco and Milton R. Clark as trustees; [244]

And it appearing that upon said bill an order was entered by this court in words and figures as follows, to wit:

“In the District Court of the United States for the Western District of Washington, Southern Division.

IN EQUITY—No. 68-E.

FIRST FEDERAL TRUST COMPANY OF SAN FRANCISCO and MILTON R. CLARK, as Trustees,

Plaintiffs,

vs.

S. E. SLADE LUMBER COMPANY, THE FIRST NATIONAL BANK OF SAN FRANCISCO, THE AMERICAN NATIONAL BANK OF SAN FRANCISCO, WELCH AND COMPANY, COATS-FORDNEY LOGGING COMPANY, SAGINAW TIMBER COMPANY, SLADE-WELLS LOGGING COMPANY, UNITED STATES NATIONAL BANK OF PORTLAND, OREGON, HUMPTULIPS LOGGING COMPANY, SUDDEN ESTATE COMPANY, R. J. LAWSON, J. I. BRITTAIN, FELIX SANTALLIER, SLADE SHIPPING COMPANY, MARY I. SLADE, S. E. SLADE, as Managing Owner of the Barkentine “JANE L. STANFORD,” and HARRIET C. FRAZER ESTATE,

Defendants.

Order.

This cause came on duly to be heard before the Court upon the bill of complaint herein, plaintiffs

appearing by Jared How and James B. Kerr, their solicitors, S. E. Slade Lumber Company appearing by Theodore B. Bruener, its solicitor, First National Bank of San Francisco appearing by E. C. Hughes, its solicitor, Coats-Fordney Logging Company and Saginaw Timber Company appearing by John C. Hogan, their solicitor;

And it was duly made to appear to the Court by satisfactory proof that the defendants Sudden Estate Company, R. J. Lawson, J. I. Brittain, Felix Santallier, Slade Shipping Company, Mary I. Slade, S. E. Slade, as managing owner of the Barkentine 'Jane L. Stanford,' and Harriet C. Frazer Estate have been paid in full the amount of their several claims described in the bill of complaint herein, and that none of said last-named defendants claim or have any interest in or to the property described in the complaint herein;

And it was further made to appear to the Court that none of the defendants who have appeared herein have filed any answer or other pleading denying any of the averments of the complaint;

And it was duly made to appear to the Court that all of the averments of the complaint herein are true;

Thereupon the prayer of the plaintiffs for instructions with respect to the duties and obligations of the plaintiffs as trustees [245] under the deed of trust dated June 2, 1915, of which a copy is attached to the bill of complaint herein was duly submitted to the Court by counsel for such plaintiffs, and upon such submission counsel for the First National Bank of San Francisco, Coats-Fordney Logging Company

and Saginaw Timber Company offered statements, evidence and argument, and counsel for said S. E. Slade Lumber Company, The American National Bank of San Francisco, Welch and Company, Slade-Wells Logging Company, United States National Bank of Portland, Oregon, and Humptulips Logging Company offered statements, evidence, and argument, and the Court being fully advised in the premises, does now

ORDER, ADJUDGE AND DECREE as follows:

First. That the First Federal Trust Company of San Francisco and Milton R. Clark, as trustees under the mortgage or deed of trust dated June 2, 1915, attached to and a part of the bill of complaint herein are under no obligation or duty, in the absence of unanimous instructions from George A. Kennedy, P. E. Bowles and A. P. Welch, named in the agreement of April 30, 1915, of which a copy is attached to the bill of complaint herein, and also in said mortgage of June 2, 1915, their successor or successors, to defend against the foreclosure of the mortgage dated September 1, 1910, made by S. E. Slade Lumber Company to Detroit Trust Company and Alexander McPherson as trustees, or against the foreclosure of the mortgage dated March 1, 1915, made by S. E. Slade Lumber Company to Detroit Trust Company, which respective mortgages are referred to and described in the bill of complaint herein, nor, in the absence of such instructions, are the plaintiffs herein under any duty or obligation to undertake the foreclosure of the mortgage of June 2, 1915, of which

a copy is attached to and made a part of the bill of complaint herein.

Second. That the plaintiffs herein, as trustees under said mortgage of June 2, 1915, in the absence of unanimous instructions from said George A. Kennedy, P. E. Bowles and A. P. Welch, their successor or successors are under no duty or obligation to join with The First National Bank of San Francisco, Coats-Fordney Logging Company and Saginaw Timber Company, or either of them, in any petition or proceeding to set aside the order heretofore entered by this Court in that suit pending herein for the foreclosure of the mortgage so made by S. E. Slade Lumber Company to Detroit Trust Company and Alexander McPherson as trustees, under date of September 1, 1910, whereby Alexander McPherson was appointed receiver of the property of S. E. Slade Lumber Company covered by said mortgage of September 1, 1910, or for the purpose of setting aside the order of this Court in said foreclosure suit, authorizing the execution of that certain contract between said receiver and Humptulips Logging Company for the cutting of the timber upon the mortgaged premises; or to take any step or proceeding in such matters or either thereof in their own separate behalf as such trustees.

Third. That the defendants The First National Bank of San Francisco, The American National Bank of San Francisco, Welch and Company, Coats-Fordney Logging Company, Saginaw Timber Company, Slade-Wells Logging Company and United States National Bank of Portland, Oregon, have such an

interest in and to the security created by said mortgage of June 2, 1915, a copy of which is attached to the bill herein, notwithstanding the provisions of said mortgage with respect to the power, authority, duties and obligations of the plaintiffs herein, as justify and make proper the intervention of [246] said defendants last above named, and each thereof, in the two suits pending in this court and described in the bill of complaint herein, or in either thereof, namely, the suit pending herein for the foreclosure of the mortgage given under date of September 1, 1910, by S. E. Slade Lumber Company to Detroit Trust Company and Alexander McPherson, trustees, and the mortgage dated March 1, 1915, given by S. E. Slade Lumber Company to Detroit Trust Company; and said defendants last above named are and each of them is hereby authorized and permitted to apply to the court in said two suits so pending herein for the foreclosure of said two mortgages of September 1, 1910, and March 1, 1915, or in either thereof, for orders permitting them to be made parties thereto.

Fourth. That the Court hereby retains jurisdiction of this cause and reserves the right to make from time to time such further order or orders as it may hereafter be advised and further from time to time to instruct plaintiffs herein as to their duties and obligations under said mortgage or deed of trust of June 2, 1915, as to the Court shall seem proper.

By the Court.

Judge.

Dated."

NOW, THEREFORE, in order to preserve the rights of all parties herein and to afford full and complete protection to each and all of the beneficiaries of the security created by said deed of trust of June 2, 1915, mentioned in the order so entered upon the bill for instructions so filed in this Court by First Federal Trust Company of San Francisco and Milton R. Clark as trustees, it is by this Court *sua sponte*

ORDERED, ADJUDGED AND DECREED that First National Bank of San Francisco, Coats-Fordney Logging Company, Saginaw Timber Company, The American National Bank of San Francisco, Welch and Company, Slade-Wells Logging Company and United States National Bank of Portland, Oregon, and each of them, be and they are hereby authorized and permitted to intervene herein and become parties defendant herein, and upon becoming such parties defendant they and each of them are hereby authorized and permitted in their own joint or several right and in the right of each of them, to present to this Court such defense as they shall be advised to be proper to the foreclosure sought herein of the mortgage described in the bill of complaint in this cause and to interpose such objections as they may be advised are proper to be [247] brought to the attention of this Court with respect to the order heretofore entered herein appointing a receiver in this cause and to the order heretofore entered herein authorizing the receiver heretofore appointed to enter into a contract with the Hump-tulips Logging Company for the cutting of the tim-

ber standing upon the premises covered by the mortgage sought to be foreclosed herein, or to any other order or proceeding heretofore made or had herein or hereafter to be so made or had.

This order is made for the purpose of permitting each and all of the several beneficiaries of the security created by the mortgage or deed of trust of June 2, 1915, referred to in said order so entered upon the bill for instructions of First Federal Trust Company and Milton R. Clark, trustees, to take such action in this court and by review on appeal, if they, or any of them, be so advised, as will afford to said parties last above named full and complete opportunity for hearing and protection otherwise than through their representation by First Federal Trust Company and Milton R. Clark as trustees.

By the Court,
EDWARD E. CUSHMAN,
Judge.

Dated December 14, 1916.

(Filed Dec. 14, 1916.) [248]

*In the United States District Court, for the Western
District of Washington, Southern Division.*

Extract from Clerk's Minutes.

Monday, December 18, 1916.

The Court convened at 9:30 A. M., pursuant to adjournment, Honorable EDWARD E. CUSHMAN, U. S. District Judge, presiding.

No. 67-E.

DETROIT TRUST COMPANY et al., etc.,

vs.

S. E. SLADE LUMBER COMPANY et al.

Earl C. Bronaugh, Esquire, in behalf of the complainants, excepts in open court to the entry of the order of the court *sua sponte* and filed herein on the 14th day of December, 1916.

Exception allowed. [249]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing and attached is a full, true and correct transcript of the record and proceedings in the case of Detroit Trust Company and Alexander McPherson, as Trustees, plaintiffs, versus S. E. Slade Lumber Company, William T. Cameron, Cameron-Hoover Logging Company, Humptulips Logging Company, First Federal Trust Company and Milton R. Clark, Trustees, Slade-Wells Logging Company, Defendants, and The First National Bank of San Francisco, Coats-Fordney Logging Company and Saginaw Timber Company, Intervenors, as required by stipulation of counsel and praecipe for additional transcript filed

and shown herein, and as the originals thereof appear on file and of record in my office in said District of Tacoma, except that the Agreed Statement of the Case, shown herein, and stipulation with reference to the same attached thereto with certificate and approval of the Judge thereon, are original papers and are transmitted herewith as part of the record in pursuance of said stipulation and approval of the Judge.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the appellants and appellees, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.)	
for making record, certificate or	
return for appellants, 685 folios at	
15¢.....	\$102.75
Certificate of clerk to transcript, 3	
folios at 15¢.....	.45
Seal to said certificate.....	.20
Clerk's fees (Sec. 828, R. S. U. S.)	
for making record and return on	
praecipe for additional transcript	
by appellees, 20 folios at 15¢....	3.00

ATTEST MY HAND and the seal of the said court
at Tacoma, in said District, this 2d day of January,
A. D. 1917.

[Seal]

FRANK L. CROSBY,

Clerk.

By F. M. Harshberger,

Deputy. [250]

[Endorsed]: No. 2912. United States Circuit
Court of Appeals for the Ninth Circuit. The First
National Bank of San Francisco, Coats-Fordney Log-
ging Company and Saginaw Timber Company, Ap-
pellants, vs. Detroit Trust Company and Alexander
McPherson, as Trustees, and S. E. Slade Lumber
Company, William T. Cameron, Cameron-Hoover
Logging Company, Humptulips Logging Company,
First Federal Trust Company and Milton R. Clark,
Trustees, Slade-Wells Logging Company, Appellees.
Transcript of the Record. Upon Appeal from the
United States District Court for the Western Dis-
trict of Washington, Southern Division.

Filed January 5, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 2912

2
**In the United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

THE FIRST NATIONAL BANK OF SAN FRANCISCO et al.,
Appellants,

vs.

DETROIT TRUST COMPANY et al.,

Appellees.

660-671 Colman Building,
Seattle, Washington

**Upon Appeal from the District Court of the United
States for the Western District of Washington,
Southern Division.**

BRIEF OF APPELLANTS.

**JOHN C. HOGAN,
HUGHES, McMICKEN, DOVELL & RAMSEY,
Solicitors for Appellants.**

660-671 Colman Building,
Seattle, Washington

Filed

LOWMAN & HANFORD CO., SEATTLE
FEB 8 - 1917

F. D. Monckton,
Clerk.

No. 2912

**In the United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT

**THE FIRST NATIONAL BANK OF SAN FRANCISCO et al.,
Appellants,**

vs.

**DETROIT TRUST COMPANY et al.,
Appellees.**

**Upon Appeal from the District Court of the United
States for the Western District of Washington,
Southern Division.**

BRIEF OF APPELLANTS

STATEMENT OF CASE.

On the 3rd day of August, 1916, the appellees, Detroit Trust Company and Alexander McPherson, as Trustees, commenced this action against the S. E. Slade Lumber Company and others, for the foreclosure of a mortgage or trust deed executed by the Lumber Company upon its mills and certain of its

timberlands, to secure a bond issue, of which \$550,000 remained unpaid at the commencement of the action. In addition to the usual relief sought, the plaintiffs in said action prayed the appointment of a receiver of the mortgaged premises. (Record, pp. 6-90.)

A second mortgage for \$69,000 was also given by the said Lumber Company to the Detroit Trust Company, on which, at the same time, a separate action for foreclosure was brought in the same Court, and that action has since, by order of the Court, been consolidated herewith.

The First Federal Trust Company and Milton R. Clark, Trustees under a third mortgage, were likewise made defendants in this action. The said third mortgage was given by the S. E. Slade Lumber Company to said last named Trustees on the 2nd day of June, 1915, to secure certain indebtedness then owing and certain advances then made by several of its creditors, including these appellants. (Record, pp. 168-198.) This mortgage covered the same premises described in the mortgage to the Detroit Trust Company and Alexander McPherson upon which this action is based, and was expressly made subject thereto and to the said second mortgage; and also included certain other lands in Chehalis (now Grays Harbor) County, Washington.

On August 4, 1916, the Detroit Trust Company and Alexander McPherson, plaintiffs and appellees herein, filed their separate petition for the appointment of a receiver, in which, among other things,

it was alleged "that the timberlands included in said mortgage are not now being operated or logged in any manner, that the sawmill of the mortgagor defendant is not being operated and has not been operated for two years, * * that the principal security for the payment of the bonds secured by the mortgage or deed of trust described herein is the timber on the lands covered thereby. That said lands when denuded of the timber thereon are of little value." (Record, pp. 91, 92.) The petition also prayed that the appellee, George L. McPherson, "be appointed receiver of the property covered by said mortgage, with full power to hold the same in his possession, custody and control until the further order of this Court, and with further power to take possession, care for and conserve the properties described in the bill of complaint and in the mortgage aforesaid, and with further power to manage and operate the properties covered by said mortgage, either by logging contract or otherwise, etc." (Record, p. 97.)

The Court thereupon appointed the said appellee as receiver of the mortgaged premises (Record, p. 101); and the said receiver, immediately upon qualifying as such and on the said 4th day of August, 1916, filed in said cause and presented to the Court his petition for an order authorizing him to enter into a contract with the Humptulips Logging Company for the logging of the timber upon said mortgaged premises, presenting with the said petition a copy of the proposed contract. (Record, p. 104.)

An order was thereupon entered by the Court, *ex parte*, on the same day, authorizing the said receiver to enter into the said proposed contract. (Record, p. 117.)

By the terms of said third mortgage, the Trustees therein were under no obligation or duty to perform any act thereunder "unless requested in writing so to do by the duly appointed representatives of said First National Bank of San Francisco, American National Bank of San Francisco and Welch and Company", a portion of the creditors secured thereby. (Record, p. 196.) The representatives of the two last named companies requested and demanded of said Trustees that they take no action in the premises. The representative of the said First National Bank in writing requested said Trustees to appear herein and resist the action aforesaid, and the appellant First National Bank of San Francisco tendered indemnity therefor; but the said Trustees declined to appear in said cause or to take any action in the premises.

On the 14th day of August, 1916, these appellants filed their petition in this cause, praying that so much of the order appointing said receiver as authorized him to operate said properties be vacated and that the said order authorizing said receiver to enter into the said proposed contract with the Humptulips Logging Company be likewise vacated and that the contract made in pursuance thereof be cancelled and set aside. (Record, p. 118.) Upon a hearing thereof, the trial judge filed a memoran-

dum opinion holding that the said petition to vacate the said orders would be denied, but that the orders would be modified so as not to permit the receiver to operate the property, except as to the logging contract made with the Humptulips Logging Company, without the further order of the Court (Record, p. 124). Thereafter, before the entry of any order thereon, the Court, upon the application of these appellants, made an order granting them leave, as intervenors herein, to amend their original petition and granting a rehearing thereof (Record, p. 126); and an amended petition was thereupon filed by these appellants. (Record, p. 128.)

The said petition again came on for hearing on the 18th of December, 1916, and the Court thereupon, on the same day, entered an order denying appellants' petition and allowing them an exception thereto. (Record, p. 139.) From said order this appeal has been perfected, and the appellants duly made and filed in said cause the following

ASSIGNMENTS OF ERROR.

That the decretal order entered in the above entitled cause on this 18th day of December, 1916, wherein the Court approved and made final the ex parte order heretofore entered in said cause on the 4th day of August, 1916, appointing George L. McPherson as receiver of the mortgaged premises described in plaintiffs' complaint, and further approved and made final the ex parte order of said Court made on the 4th day of August, 1916, author-

izing and directing said George L. McPherson, as such receiver, to enter into a contract with the Humptulips Logging Company for the logging of the timber upon said mortgaged premises, a copy of which contract is set forth in the petition of the receiver upon which said order is based, and denied the petition of these intervening defendants to vacate and set aside the contract made by said receiver in pursuance thereof, is erroneous and unjust to these intervening defendants:

First: Because the said George L. McPherson is not a receiver of an insolvent corporation and of all its assets and property, but is a receiver only of the mortgaged premises to care for and conserve the same and the rents and profits thereof, pending the foreclosure of the plaintiffs' mortgage, and is without power or authority to carry on or conduct the business of the mortgagor or any part thereof.

Second: Because the Court is without authority or power to authorize its said receiver to enter into a contract by which the carrying on of any part of the business of the mortgagor is delegated to a third party.

Third: Because the Court is without power to authorize the said receiver of the mortgaged premises to cut and remove the standing timber from the mortgaged premises or to cause the same to be sold and disposed of at private sale.

Fourth: Because the Court exceeded and abused its discretionary powers in authorizing and approving the making of said contract by its receiver.

Fifth: Because the execution and carrying out of said contract would require a period of eight or ten years and would prevent the final hearing and determination of the cause of action instituted by plaintiffs and pending herein and the entry and execution of a final decree therein during said time.

Sixth: Because the carrying out of said receiver's contract divests this proceeding of the ordinary judicial processes of the Court and authorizes the disposition by the receiver, at private sale, of the principal part of the property in the custody of the Court.

Seventh: Because it deprives these intervening defendants of their equity of redemption in said mortgaged premises which is secured to them by the execution and delivery of the mortgage of said S. E. Slade Lumber Company to the First Federal Trust Company and Milton R. Clark, mentioned in the complaint of plaintiffs in the above entitled cause.

Eighth: Because it impairs and diminishes the value of their equity of redemption in said mortgaged premises which is secured to them by the execution and delivery of the mortgage of said S. E. Slade Lumber Company to the First Federal Trust Company and Milton R. Clark, mentioned in the complaint of plaintiffs in the above entitled cause.

— — — — —

The said contract which the Court authorized the receiver to enter into with the Humptulips Logging

Company (Record, p. 105) provided, in substance, as follows:

That the Logging Company was to have the exclusive right to enter upon said lands for the purpose of cutting and removing the timber thereon and was to log and place in the Humptulips River at least fifty million feet B. M. per annum. After placing them in the river, the Logging Company was to drive the logs with all possible dispatch and to market and sell them at the highest market prices obtainable by said Logging Company. The proceeds of the sale of the logs was to be disposed of as follows: First, the cost of driving, booming and towing the logs to market, not exceeding \$1.30 per thousand feet, was to be paid to the Logging Company; second, \$3.00 per thousand feet was to be paid to the receiver; third, the actual logging expense was to be paid to the Logging Company; fourth, the balance up to \$1.00 per thousand feet was to be paid to the Logging Company as its profit; fifth, any balance remaining thereafter to be paid to the receiver. The receiver reserved the right to sell the logs upon paying the Logging Company the cost of logging and its profit of \$1.00 per thousand feet thereon, and the contract provided: "But in no instance shall this be done unless I (the receiver) have in hand from the purchaser of any such logs a sum of money sufficient to pay me at least my \$3.00 (per thousand feet) and you (the Logging Company) your logging expense and profit thereon."

The contract also provided that "This agreement

shall continue in full force and effect until the above described lands have been completely logged and lumbered, but it may be cancelled by either party hereto at any time, for any reason satisfactory to the party cancelling, upon sixty days (by this is meant days in which work can be done) written notice of such cancellation to the other party." The lands described in the contract consist of all the timberlands covered by the mortgage which is sought to be foreclosed in this action.

The mortgage in suit recites that the Lumber Company "owns large tracts of timber lands in the State of Washington, with a stumpage aggregating approximately six hundred and fifty-two million (652,000,000) feet, and also owns mills and mill sites and mill plants, water front, real estate, railroad tracks and right of way and equipment, logging equipment, and other structures and buildings on said property," (Record, pp. 31, 32) which property was thereafter specifically described and mortgaged therein. Article III of said mortgage (Record, p. 53) provides:

"While the Lumber Company shall be in possession of the premises and property covered by this instrument, it is understood and agreed that the Lumber Company shall have the right to cut or remove timber from said premises or of the timber covered hereby, and convert the same to its own use, upon the following terms and conditions: Before beginning to cut or remove any such timber the Lumber Company shall file with the Trustee due and sufficient information, with maps, plats, facts and figures showing and advising the Trustee of the location and quantity of the timber which it is pro-

posed to cut or remove during each month of the period during which such cutting or removal is proposed to continue; all duly verified by the signature of the President or Secretary of the Lumber Company; the quantity of such timber shall be determined by the estimates of James D. Lacey & Company, duplicate copies of which are on file in the offices of the Trustee and the Lumber Company, or by other estimates satisfactory to and to be filed with and accepted in writing by the Trustee; the Lumber Company shall pay to the Trustee in advance on the first day of each month at the rate of three dollars (\$3) per thousand feet of stumpage for all the timber proposed to be cut or removed during that month; the amount of timber so cut or removed shall be verified at the end of each month, or as often as the Trustee may in writing require; such verification shall be evidenced by the sworn statement of an officer of the Lumber Company, or of some other person satisfactory to the Trustee; in case such verification shall show any excess of timber over the estimates as aforesaid, the Lumber Company hereby covenants and agrees that it will immediately and without demand pay to the Trustee for such excess at the rate aforesaid; in case the amount of timber proves to be less than the estimate, the Lumber Company shall not be entitled to receive back any part of the price paid by it; all payments made under the provisions of this article shall be placed in the sinking fund hereinafter mentioned, and shall be disposed of as hereinafter provided.

Provided, that no timber shall be cut or removed as aforesaid without the consent in writing of the Trustee while the Lumber Company is in default in payment for timber, or in payment of principal or interest or in any other covenant, provision, agreement or condition hereunder. And provided further, that all cutting hereunder shall include all the merchantable timber included in the territory proposed to be cut over, and shall be done in a good, workmanlike manner and so as to reduce as much as possible the danger of fire."

The third mortgage, under which the indebtedness of the appellants is secured, contains the following provision (Record, p. 193) upon the above subject:

“Nothing in this instrument contained shall be construed as in any way limiting the right of the Mortgagor to cut or remove timber from the premises and property covered hereby and converting the same to its own use, free and clear of the lien of this instrument, so long as such cutting or removing is done in accordance with the provisions of the first mortgage above referred to, and so long as the Mortgagor is not in default in the performance of any of the covenants, stipulations, conditions and agreements on its part to be performed in said first mortgage, or in this mortgage contained.”

Paragraph 3 of the agreed statement of the evidence (Record, p. 152) is as follows:

“The Lacey cruise, referred to in the mortgage sought to be foreclosed herein, a copy of which mortgage is attached to the bill of complaint of the Detroit Trust Company and Alexander McPherson in this cause, shows the amount of merchantable timber upon said mortgaged premises at the date thereof to have been 652 million feet, and it is shown by the evidence that subsequent thereto and prior to the first day of August, 1914, there had been logged and sold 100 million feet of timber, and that no logging had been done thereafter prior to the appointment of the receiver herein.”

It is thus made to appear that the operation under the receiver's contract, if conducted at the minimum rate, would cover a period of upwards of ten years; that the lands when logged will be of only nominal value; and that the mill plant of the mort-

gagor had not been operated for about two years prior to the commencement of this action.

BRIEF AND ARGUMENT.

As will be seen from the foregoing statement, the receiver appointed in this case is a receiver only of the mortgaged premises in aid of foreclosure. The receiver is not invested with power and authority over the other property of the mortgagor, a portion of which at least is covered by the third mortgage securing these appellants. In other words, he is not a receiver of all the assets of an insolvent corporation for the benefit of all its creditors.

The question presented by the assignment of errors is whether a chancellor, in the appropriate exercise of the inherent power of a court of equity, may in such a case, where the mortgaged premises are adequate to the satisfaction of the debt secured by them, authorize its receiver to enter into a contract with a third party to conduct logging operations with a view to cutting all the timber on the land covered by the mortgage and selling the same at private sale through the agency of the company engaged in conducting the logging operations, for the purpose of paying the expenses of the receivership and of operation and of satisfying the debt secured by the mortgage; and especially where such operation is not designed to be merely temporary in character and for the preservation of the property, pending the foreclosure of the mortgage.

I.

By Section 804, Remington & Ballinger's Annotated Codes and Statutes of Washington, it is provided:

"A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law."

By this statute it is the declared public policy of this State that title and the right of possession of real property, with the fruits thereof, shall remain in the mortgagor until foreclosure and sale.

Norfor v. Busby, 19 Wash. 450.

In its opinion in that case the Supreme Court of Washington expressly approved the decision of this Court in the case of *Couper v. Shirley et al.*, 75 Fed. 168, in which case this Court affirmed the action of the trial court in refusing to appoint a receiver of mortgaged premises pending foreclosure, notwithstanding a stipulation in the mortgage that such appointment might be made, for the reason that such action would be in contravention of the statute of the State of Oregon, which is identical in terms with the statute of Washington above quoted.

In *Jones on Mortgages*, Sec. 1532, it is said:

"To warrant an appointment of a receiver it must be shown both that the property itself is an inadequate security and that the debt or the deficiency after the application of the proceeds of the security could not be collected of the mortgagor or other person liable for it. The property may be inadequate security for all the incumbrances upon it, and yet

be sufficient for the particular mortgage which is the subject of the foreclosure suit."

And see:

High on Receivers, §§642, 667.

Warner v. Gouverneur, 1 Barb. 36.

Brown v. Chase, Walker (Mich.), 43.

Without reference to the statute, therefore, there existed in this case no established equitable ground for the appointment of a receiver, unless it were for the mere care and custody of the property pending foreclosure and for the purpose of providing for the payment of taxes and the maintenance of proper insurance upon the mill properties; but even the latter would not alone justify the appointment of a receiver where, as in the case at bar, the mortgage authorized the mortgagee to pay the taxes and provide the insurance and include such advances within its mortgage lien.

Planters' Oil Mill v. Carter, (Ga.), 79 S. E. 1120, 1123.

Eureka Mining, etc., Co. v. Lewiston Navigation Co., 12 Idaho, 472.

Ray v. Carlisle, 125 Ga. 316.

Ferguson v. Dickinson, (Tex.) 138 S. W. 221.

In the case at bar, however, the mortgagor appeared and consented to the appointment of the receiver; and hence, so far as the appointment carried with it only the possession of the property and authority to care for and preserve it pending the foreclosure proceeding, these appellants would perhaps at this time have no ground for assignment of reversible error.

It will be seen, therefore, that the receiver exercises the possessory rights that, but for the voluntary consent of the mortgagor, would abide in it. The mortgagor, however, under the provisions of the third mortgage above quoted, being in default, has no right, over the objection of the beneficiaries under said mortgage, to log and sell the timber on the mortgaged premises.

As said by the Supreme Court of California (*Title Ins., etc., Co. v. California Development Co.*, 127 Pac. 502, 504) :

“The right of a mortgagee to have a receiver take charge of the mortgaged property during the pendency of the action is founded upon the proposition that such action is necessary in order to preserve or protect the interest of the mortgagee. His only interest is the lien of his mortgage, and its extent is measured by the amount of the debt for which the lien is security. The debt is the substantial thing. Unless the security for its ultimate payment is in some way endangered or impaired, he cannot be prejudiced.”

It is pertinent to inquire, therefore, whether a court of chancery may authorize a receiver of mortgaged premises, appointed on a bill of foreclosure, to do what neither the mortgagor nor mortgagee might lawfully do; what, indeed, they could not jointly do, in derogation of the rights of the beneficiaries under the third mortgage, and without the consent of the mortgagee thereunder.

In *Alderson on Receivers*, p. 526, it is said:

“A receiver of an insolvent corporation has no greater rights than the corporation. He is bound by all its legal acts; he is subject to all the rights

and equities existing against it, and the liabilities and rights of third parties are not changed by his appointment. He simply takes its place and stands as its representative, being also the trustee for the stockholders and creditors whose rights he may assert if they have been affected by the fraudulent or illegal acts of the corporation."

In the case at bar, however, the trial court authorized its receiver to enter into a contract with a third party for the logging and sale of the timber standing upon the mortgaged premises, on terms much less onerous and restricted than those under which the mortgagor, while not in default, was, by the terms of all the mortgages, permitted to log the premises. For it will be observed that the mortgagor under the terms of these mortgages was, while not in default, permitted to cut and remove the timber from the mortgaged premises only upon filing with the trustees maps showing the location and quantity of the timber proposed to be cut or removed during any month and paying for the whole thereof in advance at the rate of \$3.00 per thousand feet stumpage, in accordance with the Lacey cruise; and all risks and expenses were to be incurred by it, including the risk that the amount of timber actually cut should be less than the Lacey cruise. Whereas, under the receiver's contract, the Logging Company assumes no like obligations or risks and is at liberty to prosecute its operations wherever it may deem it profitable to do so on the mortgaged premises, and to terminate the contract, without penalty, whenever its prosecution shall cease to return a profit satisfactory to it.

As has been aptly said by Mr. Justice Chadwick, in *Crawford v. Gordon*, 88 Wash. 553, 560, speaking of the power of courts of equity in case of a receivership:

“Courts have great power, but they cannot make contracts.”

And surely courts cannot, through receivers appointed in aid of foreclosure, make contracts respecting the mortgaged premises which the mortgagor and the mortgagee could not make, either separately or conjointly, without the consent of a junior encumbrancer.

II.

Even were it assumed that a receivership of mortgaged premises in aid of foreclosure may in a proper case extend beyond the mere custody and preservation of the mortgaged property pending final judgment and sale, is the receiver's contract here involved an appropriate exercise of the just powers of a court of chancery? A brief consideration of the law on this subject will be enlightening.

In the case of *Little Warrior Coal Co. et al. v. Hooper*, (Ala.) 17 So. 118, 119, the Court says:

“The proper purpose for the appointment of a receiver is to conserve the assets for the protection and benefit of creditors, and pay them as speedily as possible. * * * It is only in extraordinary cases, and where public and quasi public corporations are involved, that a chancery court is justified in undertaking to carry on indefinitely the business through a receiver. In the case of *Smith v. Smith*, (Ala.) Brickell, C. J., says: ‘We take occasion to mention that it does not belong to the jurisdiction of courts

to undertake the management of private or corporate business. When property is in the possession of a court, it must be preserved; and when no public duty is owing, as in the case of railroads, this is the extent to which courts are authorized to go. Such management, therefore, should in all cases be temporary, and limited to the performance of the duty of preservation.' ”

The same court, in the case of *Etowah Mining Co. v. Wills Val. Min. & Mfg. Co. et al.*, (Ala.) 17 So. 522, 523, says:

“We know of no principle of law which justifies a court of chancery to take possession of property admitted to be that of a private corporation, whether conveyed to a trustee or not, merely for the purpose of running its business indefinitely through a receiver, to realize an income for the benefit of its creditors until they are paid from this source.”

While in the case of *Fosdick v. Schall*, 99 U. S. 235, and numerous other cases, the Supreme Court of the United States has held that receivers of an insolvent railway company, pending a suit to foreclose a mortgage executed by the railway company, may operate the properties pending foreclosure and make the expense of operation a first lien thereon, it is nevertheless said by that Court, in *Wood v. Trust Co.*, 128 U. S. 416, 421:

“The doctrine of *Fosdick v. Schall* has never yet been applied in any case except that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern.”

In *Kneeland v. Trust Co.*, 136 U. S. 89, the Su-

preme Court, in condemning the practice of appointing receivers and attempting to exercise absolute control over the property, uses this language:

“It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations?

In *Hanna v. Trust Co.*, 70 Fed. 2, Mr. Justice Caldwell, in a suit to foreclose a second mortgage, in which a receiver was appointed, held that certificates might be issued to pay taxes, but that the Court would not, against the objection of the first mortgagees, issue certificates to displace their liens for other purposes. It may be here contended that the receiver will operate successfully under his contract and will not, by reason thereof, be compelled to issue certificates to constitute prior liens upon the mortgaged property. But, in any event, the timber will be cut, removed and sold, and appellants' lien thereon will thus be effectually destroyed, and without any recourse, unless relief be afforded on this appeal.

In *International Trust Co. v. United Coal Co.*, 60 Pac. 621, 625, the Supreme Court of Colorado said:

“After a careful consideration of all the authorities cited, we are of opinion that, in administering the affairs of an ordinary insolvent private business corporation, for which a receiver has been appointed, a court of equity has not the power to authorize the receiver to incur indebtedness for carrying on the business, and to make the same a first and paramount lien upon the corpus of the property, superior to that of prior lienholders, without

their consent. While it may, in a proper action, and with the proper parties present, through the instrumentality of a receiver, carry on the business of private corporations or individuals temporarily, and incur obligations therefor that may be made a paramount lien on the corpus of the property, *such obligations must have been contracted for, and must relate strictly to the preservation of the status of the property at the time of the appointment of the receiver.* We are not disposed to extend the doctrine established by the federal courts in administering upon insolvent railroad corporations to those of ordinary business corporations.” (Italics ours.)

In *Hanna v. State Trust Co.* (*supra*), Mr. Justice Caldwell says:

“It is not a function of a court of equity to carry on the business of private corporations, whether solvent or insolvent. * * * Its only guide is that varying and unknown quantity called ‘judicial discretion.’ * * * ‘Rights,’ says the Supreme Court of the United States, ‘under our system of law and procedure, do not rest in the discretionary authority of any officer, judicial or otherwise.’ * * * It is no part of the duty of a court of equity to conduct the business of insolvent private corporations, any more than it is to carry on the business of insolvent natural persons. If it may take under its control the property of an insolvent private corporation, and authorize a receiver to carry on its business, and make the debts incurred by the receiver in so doing paramount liens on all the property of the corporation, and enjoin its creditors in the meantime from collecting their debts, it is not perceived why it may not proceed in the same way with the estate of an insolvent natural person.”

In the case of *Bigbee v. Summerour*, 28 S. E. 642, 643, the Supreme Court of Georgia uses this language:

“A receiver should be appointed only in cases of extreme necessity, and then only when his appointment is necessary to the preservation of the thing or right in controversy. * * We do not mean to intimate that cases may not arise in which, in the exercise of a wise discretion, a circuit judge would be authorized to appoint a receiver, and direct him to continue the conduct of a business in which the defendant was engaged at the time his property was seized; but we do mean to say that such a course can only be justified when it is absolutely necessary to the preservation of the rights of the parties, it being borne in mind that preservation of the property is the purpose for which a receiver is primarily appointed, and that a judicial administration through him of an estate seized by the court, though the final is nevertheless a secondary consideration. Necessarily, these matters are largely within the discretion of the trial judge, *but at last it becomes a question of law whether the court can lawfully embark property seized by it in an industrial enterprise, and the exercise of this power depends upon how far such conduct may be fairly necessary to the preservation of the existing status.*” (Italics ours.)

In *Gutterson & Gould v. Lebanon Iron & Steel Co.*, 151 Fed. 72, 74, it is said:

“A managing receivership is never undertaken except with the view to winding up the affairs of the company and a sale of its property.”

In the light of the principles laid down in the foregoing authorities, how can it be said that the trial court acted within the just scope of his powers in authorizing the receiver to enter into the contract in question with the Humptulips Logging Company? If this contract is permitted to be carried out, the following consequences will result:

- (1) The receiver will be permitted to delegate to

a third party the possession and control of the most valuable property in his custody and to operate the business of cutting, removing and selling the logs thereon and of collecting and receiving the proceeds of said logs, without bond and without being immediately responsible to the Court for its acts or conduct.

(2) A receiver's contract will be sanctioned and approved which could not have been made, over the objection of appellants, by either the mortgagor or mortgagee, or by their joint action; and not only so, but that contract will be in conflict with the mortgage contract upon which this action is based, as well as the third mortgage securing these appellants.

(3) The Court's receiver will be permitted to alter the character of the mortgaged premises in his possession and convert the principal value of the mortgaged real estate into personal property, and this, not by himself, but through the agency of a third party.

(4) The principal element of value in the mortgaged property, after being converted from real estate into personalty, will be sold at private sale; and this, not by the receiver directly, but through an irresponsible agency.

(5) The carrying out of the receiver's contract will prolong this litigation and prevent the entry and execution of a final decree herein for a period of more than ten years, and thus arrest the due and ordinary course of the administration of justice.

(6) The carrying out of said receiver's contract

will, as to the principal part of the mortgaged premises, prevent the exercise of the ordinary judicial processes of the court in foreclosure cases.

(7) It will deprive these appellants of their equity of redemption so far as concerns the principal part of the mortgaged premises, and will impair its value as to the remainder.

(8) If the receiver's contract is carried out to successful completion, it will result in the gradual, but ultimate, satisfaction of the debt secured by the mortgage sought to be foreclosed herein and the consequent dismissal of this action, without any redress from the wrong suffered by these appellants, unless the same be redressed upon this appeal.

Respectfully submitted,

JOHN C. HOGAN,
HUGHES, McMICKEN, DOVELL & RAMSEY,
 Solicitors for Appellants.

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United States
Circuit Court of Appeals

For the Ninth Circuit

THE FIRST NATIONAL BANK OF SAN
FRANCISCO et al.,

Appellants,

vs.

DETROIT TRUST COMPANY et al.,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE WEST-
ERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

FEB 17 1917

BRIEF OF APPELLEES F. D. Monckton,
Clerk.

Snow, McCamant & Bronaugh,
Bridges & Bruener,
Solicitors for Appellees.

Northwestern Bank Building, Portland, Oregon.
Aberdeen, Washington.

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STATEMENT OF THE FACTS.

S. E. Slade Lumber Company is the owner of a valuable tract of timbered lands situated in Township 21, North of Range 9, West of the Willamette Meridian, in Grays Harbor County, Washington, and of a valuable sawmill plant situated in the City of Aberdeen. It mortgaged all this property to Detroit Trust Company and Alexander McPherson,

as Trustees, to secure an indebtedness of One Million Dollars of which there remains due the principal sum of \$550,000 (R. 31). Later Slade Lumber Company gave its second mortgage to Detroit Trust Company to secure an indebtedness of approximately the sum of \$69,000. On the 30th day of April, 1915, a certain creditors agreement was entered into by and between The American National Bank of San Francisco, Welch & Company, United States National Bank of Portland, Slade-Wells Logging Company, Humptulips Logging Company, First National Bank of San Francisco, Coats-Fordney Logging Company, Saginaw Timber Company and Sud-den Estate Company, which agreement was entered into for the purpose of protecting and securing the claims of the unsecured creditors of S. E. Slade Lumber Company, and with the purpose of committing the signers of said agreement to the advancement, for a period of one year and optionally for two years, of sufficient moneys to pay the interest on the bonds secured under the first mortgage, as well as the interest on the second mortgage; the taxes on the property and the insurance premiums, upon condition that the first mortgagee would waive the collection for a period of one year, and provisionally for a period of two years, of the principal of the maturing bonds under said first mortgage. Under said creditors agreement it was contemplated that a third mortgage should be made by S. E. Slade Lumber Company to First Federal Trust Company, a corporation, as Trustee, covering the properties of the

Lumber Company described in the first and second mortgages, including other property (R. 160). The third mortgage was thereafter duly executed (R. 168). The creditors agreement provides that the parties thereto shall be represented by a committee consisting of Geo. A. Kennedy, representing The First National Bank of San Francisco; P. E. Bowles, representing The American National Bank of San Francisco and A. P. Welch, representing Welch & Company, and it is provided in said agreement that said committee, representing all the creditors, should have power only to act unanimously and not by a majority. The third mortgage provides, among other things, that the Trustees shall be under no obligation or duty to perform any act thereunder, unless requested in writing so to do by duly appointed representatives of said The First National Bank of San Francisco, The American National National Bank of San Francisco and Welch & Company (R. 196), and it is further provided therein that the Trustees shall have the exclusive right of action thereunder and that none of the beneficiaries should be entitled to commence any action unless the Trustees should refuse or fail so to do when properly thereunto requested (R. 197).

Detroit Trust Company and Alexander McPherson, as Trustees, duly filed their bill of complaint, seeking to foreclose the first mortgage. Thereafter they filed a petition praying for the appointment of a receiver with power to operate (R. 90). Attached to the petition for the appointment of a receiver is

the assent of S. E. Slade Lumber Co., Humptulips Logging Co. and Slade-Wells Logging Co., with a prayer that the court make the order applied for (R. 100, 254). At the time of the appointment of the Receiver, P. E. Bowles and A. P. Welch, two of the three members of the committee named in the creditors agreement hereinabove mentioned, by telegram to the clerk of the court requested the appointment of a receiver as prayed for in the petition (R. 152). At the same time American National Bank of San Francisco and Welch & Company, two of the beneficiaries under the third mortgage, by telegram to the court requested the appointment of a receiver as prayed for (R. 254). Attached to the petition for the appointment of a receiver, among other affidavits, was also the affidavit of John C. Ainsworth, President of the United States National Bank of Portland, one of the beneficiaries under the third mortgage.

After the appointment of a receiver and after the receiver had, with the approval of the court, entered into a logging contract with Humptulips Logging Company, the appellants herein appeared by petition and moved the vacation of the order appointing the receiver with power to operate, upon many grounds. It is also alleged in said petition that the Trustees under the third mortgage are under the terms of the mortgage under no obligation to perform any duty thereunder unless requested so to do in writing by the duly appointed representatives of The First National Bank of San Francisco,

The American National Bank of San Francisco and Welch & Company respectively, and have not appeared in or taken any action in the premises; that the said American National Bank of San Francisco and Welch & Company, by their respective representatives, have joined in a request for the appointment of a receiver with power to operate and refused to join with petitioners to request the Trustees to act in the premises herein (R. 118, 119).

The Trustees under the third mortgage, First Federal Trust Company and Milton R. Clark, have made no appearance in this suit. As appears by the court's order made **sua sponte** (R. 295, 296), said Trustees brought an independent suit against all the beneficiaries under the third mortgage, for instructions with reference to their powers and duties under said third mortgage, and after hearing the court rendered a decree in said suit to the effect that in the absence of unanimous instructions from the said Geo. A. Kennedy, P. E. Bowles and A. P. Welch, the committee representing the creditors, the Trustees were under no duty or obligation to appear in this suit (R. 300). The court in its order **sua sponte** authorized all of the beneficiaries under the third mortgage to appear in this suit and take such action as they might deem proper (R. 302).

Thereafter American National Bank of San Francisco, Welch & Company, United States National Bank of Portland, Slade-Wells Logging Company, and Humptulips Logging Company, being the majority both in number and amount of

the beneficiaries under the third mortgage, (the smaller creditors having been paid off R. 287, 298), filed an answer challenging the right of the appellants, by reason of the terms of the creditors agreement and the third mortgage, to appear and contest the appointment of a receiver with power to operate, and further submitting that if the beneficiaries under the third mortgage are proper parties defendant, then that the order of the court appointing a receiver with power to operate and the order of the court authorizing the receiver to make and enter into a logging contract with Humptulips Logging Company and approving said logging contract, be continued in force for the reasons which are stated at length in said answer (R. 130).

There was considerable testimony offered by the plaintiffs and the Receiver in support of the petition for the appointment of a receiver and the logging contract entered into with Humptulips Logging Company.

The testimony in brief is as follows: Prior to the 2nd day of June, 1915, and ever since that date, the Slade Lumber Co., with the knowledge and consent of the creditors secured under the third mortgage, attempted to sell its timber holdings for \$1,250,000., which price is substantially on the basis of \$2.35 per M feet, board measure, for all of the timber on said lands, but without success (R. 261, 262, 275). The timber market is characterized by a very general desire on the part of owners to sell and little inclination on the part of capital to buy, and large

tracts of timber can now be bought at prices substantially identical with those paid in 1906 and 1907. There is much timber that may be acquired by undertaking to pay for it as it is cut. The competition of today in the timber market is between sellers rather than buyers, and the value of the Slade tract cannot be secured for the owners under present conditions, except by cutting and marketing the same (R. 256, 257, 258, 260, 262, 268, 270, 271, 273, 276). The Slade Lumber Co. is unable at the present time to pay its debts as they mature and if the properties of the Lumber Company are forced to sale, they would not bring enough to pay the debts of the Company (R. 255, 257). It is absolutely necessary for the preservation of the property, and to prevent the waste and deterioration of the same, that a receiver be appointed to conduct such operations as will enable the Lumber Company to have its timber lands logged and the proceeds applied to the payment of taxes, insurance premiums and other incidental charges and to the extinguishment of the debts of the Company. In no other way than by a logging operation conducted on the timber lands of the Company, can the Lumber Company ever raise sufficient moneys to pay the debts due from it to its creditors, and if such operations are not commenced and conducted immediately, the property of the Company will so deteriorate in value as to be insufficient to pay the debts due from the Company (R. 255, 256). The appointment of a receiver as prayed for is the most advantageous plan to adequately conserve the

properties of the Lumber Company, protect its creditors and save an equity for the Lumber Company (R. 255, 257).

The valuable mill property of the Company is, because of insufficient care and attention, due to lack of funds, daily deteriorating in value and being wasted, and unless something is done immediately for the preservation and upkeep of the mill property it will soon lose the greater part of its value (R. 257, 259, 260).

In the year 1912 the Warren Company was engaged in logging the timber lands of the Slade Lumber Co., but defaulted in its contract. By reason thereof the logging operations of the Warren Company were not cleaned up in a proper manner and there is constantly a very decided danger of great loss to the timber by forest fires; that if such a fire ever started in the mortgaged property it would cause irreparable injury and damage thereto because of the condition of the logged over places in the property and because no fire patrol is kept. The danger of fire to the mortgaged property is increased by the fact that in the immediate neighborhood thereof there is a large quantity of logged-off lands and because of the fact that several logging operations are now being and have lately been conducted in the immediate neighborhood of the mortgaged property (R. 259). There have been a number of fires in the vicinity of the Slade lands and as late as the year 1915 there was a fire in Section 23, which would have destroyed all the felled timber of the Slade Lumber

Company had it not been for the fact that a logging crew happened to be in that vicinity and were able to put out the fire (R. 279, 280). It is entirely possible to greatly minimize any danger by fire by the employment on the property of a force of men engaged in logging the same (R. 259).

At the time the Warren Company ceased operations there were and there now are in the neighborhood of twelve million feet of Fir logs which have been cut and bucked and which now lie in the woods and have not been moved on account of the financial inability of the Lumber Company to move them. These logs represent where they lie approximately \$70,000. These logs are daily deteriorating in value and will soon be of no value unless they can be removed from the woods and sold. Said logs also constitute an extraordinary fire risk. The skidroads which have been constructed upon the property and the moneys which have heretofore been spent in opening up the property so that it could be properly logged, will be entirely lost unless steps are immediately taken to conduct logging operations upon said lands (R. 260).

The only testimony attacking the contract which the Receiver made with the Humptulips Logging Co., is the affidavit of A. J. Morley, the Manager of Saginaw Timber Company, one of the appellants. Against this affidavit we have the affidavit of S. E. Slade, President of S. E. Slade Lumber Company, (R. 261), the affidavit of C. M. Weatherwax, President and Manager of Aberdeen Lumber & Shingle Com-

pany, (R. 266), the affidavit of A. L. Paine, the Manager of National Lumber & Manufacturing Company, (R. 269), the affidavit of William Corkey (R. 269), O. P. Burrows (R. 271), Eugene France (R. 272), W. J. Patterson (R. 273), W. B. Mack (R. 274), and Almerion P. Stockwell (R. 278). These affidavits are from men who are intimately acquainted with timber values, logging contracts, logging operations and the market price of logs on Grays Harbor. They say that the Slade timber cannot be sold in the open market on the basis of \$3. per M feet stumpage and only by a logging contract can any such value be realized; that any logging contract which returns to the Slade Lumber Co. stumpage at the rate of \$3. per M feet for all timber removed, would insure to the owner the full market value of the timber (R. 262, 267, 269, 270, 271, 272, 273, 275, 278). That they have examined the contract in question and that said logging contract is a very fair and profitable contract for the Receiver and for the estate of the S. E. Slade Lumber Co., and the only means by or under which all of the creditors of the Lumber Company can be paid and any possible equity in the lands saved for the Lumber Company (R. 262, 264, 267, 269, 270, 272, 273, 276, 279). Said contract does not permit any undue and unreasonable profits and gains to the Humptulips Logging Co. and considering the obligation of the Logging Company to finance the logging operations, the depreciation on its equipment, the interest on its investment, its logging expense and other charges

not included in logging expense under the contract, the fluctating market value of logs on Grays Harbor and the risks which the Logging Company must take under said contract, the compensation up to \$1. per M feet to be paid to the Logging Company, provided the logs sell for sufficient to pay said \$1. or any part thereof, is a very reasonable compensation to be paid to the Logging Company. Under the terms of the contract, if any profit over and above \$1. is realized, said profit must be paid to the Receiver, and such provision is more favorable to the Receiver and to the owner of the timber lands than the ordinary and usual contracts of like nature entered into in the past by loggers in Grays Harbor County. In all contracts between an owner of timber and a logger, for the logging of timber, the logger always figures on making the sum of \$1. per M feet over and above all expenses and after paying the stumpage value to the owner as agreed upon, and such \$1. per M feet is the customary and usual profit which a logger expects to make. Said contract ample protects the Receiver, the defendant S. E. Slade Lumber Co. and the creditors of said Lumber Company, and does not permit the Humptulips Logging Co. or anyone else to over-reach the Receiver or the beneficiaries of the estate (R. 265, 268, 269, 270, 271, 274, 276, 277, 279.)

In addition to the foregoing affidavits we have the testimony of John C. Ainsworth, President of United States National Bank of Portland, (R. 263),

D. B. Fuller, Vice President of American National Bank of San Francisco (R. 265), A. P. Welch, President of Welch & Company (R. 266), C. B. Wells, President of Slade-Wells Logging Company (R. 266), which corporations, together with Humptulips Logging Company, represent a majority, both in number and amount, of the claims secured under the third mortgage. These affidavits set forth that it will be for the best interests of all the creditors of the Lumber Company, and more particularly for the interests of all the creditors secured by the third mortgage, that the timber lands of the Lumber Company be cut and logged; that they are acquainted with the logging contract which has been entered into by the Receiver and in their opinion said contract is a fair and reasonable contract and that it will be to the best interests of all the creditors that the contract be kept in force and carried out.

It is further shown by the affidavits of John C. Ainsworth (R. 264), C. M. Weatherwax (R. 268), W. J. Patterson, Cashier and Manager of Hayes & Hayes Bank, (R. 274), and A. L. Paine (R. 269), that if the logging operations are conducted under said contract for a period of two or three years, the indebtedness of the S. E. Slade Lumber Co. will be so materially reduced and the advantages of said timber lands and the operations thereunder as a going concern be made so apparent that it will be possible for the Lumber Company either to re-finance its obligations or make possible the sale of its properties at a price more than adequate to pay the in-

debtedness of the Lumber Company and leave an equity for it.

The timber, if logged under the contract in question, will be brought to market by means of the Humptulips River, which now is and for upward of twenty years past has been one of the most extensive and successful logging and driving stream in Grays Harbor County (R. 275, 267, 269). The Grays Harbor Boom Company and Humptulips Driving Company are public service corporations operating on the Humptulips River, and the customary and public charge of said Companies and of Humptulips Towing Company, for timber, taking the rate as the Slade timber, is \$1.25 per M feet (R. 280).

It is further shown that the financial condition of Humptulips Logging Co. is sound and that the Company is amply able to carry out the terms and conditions of its contract (R. 274).

Prior to the commencement of the foreclosure suit and, to-wit, in the early part of the year 1915, H. P. Brown, President of Humptulips Logging Co., made a proposition for the logging of the Slade timber, to the committee of creditors. This proposition is shown on page 289 of the Record. The answer of the committee of creditors, the First National Bank of San Francisco being represented by James K. Lynch, its Vice President, is shown on page 290 of the Record. The proposition submitted by Mr. Brown was to log the timber at cost, plus \$1. for operation, which was acceptable to the representative of the First National Bank (R.287).

It is further shown that the total indebtedness of the Lumber Company is about \$1,200,000.00 (R. 289). Creditors whose claims aggregate five-sixths of this total ask for the continuance of the Receivership (R. 261).

RECEIVERSHIP DISCRETIONARY.

No proposition is better settled than that the court of original jurisdiction enjoys a wide discretion in the appointment of a receiver. The principle is thus stated in

High on Receivers, 4th Ed., Sec. 7.

“The appointment of a receiver *pendente lite*, like the granting of an interlocutory injunction, is to a considerable extent a matter resting in the discretion of the court to which the application is made, to be governed by a consideration of the entire circumstances of the case. And since the appointment of a receiver is thus a discretionary measure, the action of the lower court in appointing or denying a receiver *pendente lite* will not be disturbed upon appeal unless there has been a clear abuse.”

Also same work, Section 25:

“It may be safely said that, since the appointing or refusing a receiver is largely a matter of sound judicial discretion, even in those states where an appeal is allowed from such interlocutory order, if the testimony addressed to the court below is conflicting, and if that court, after duly weighing and considering the testimony, either appoints or refuses to appoint a receiver, an appellate court will not interfere with the exercise of this discretion, in the absence of any facts showing that it has been

abused. And when the testimony is conflicting and the court below has, after hearing, refused to revoke its appointment of a receiver, an appellate court will refuse to control the discretion of the inferior tribunal.”

This principle is recognized by a well considered decision of this court.

Heinze vs. Butte & Boston Co., 126
Fed. 1, 11.

In this case Judge Gilbert said:

“An appellate court will not reverse the order of a lower court in appointing a receiver or in directing his action, unless it appears that the discretionary power of the court has been so improvidently and improperly exercised as to bring its action clearly within the meaning of the term ‘abuse of power.’” Beach on Receivers, Sec. 118; Sanders vs. Slaughter, 89 Ga. 34, 14 S. E. 903; Nimocks vs. Shingle Co. 110 N. C. 230, 14, S. E. 684; Beaumont vs. Beaumont, 166 Pa. 615, 31 Atl. 336; Fluker vs. City Railway Co., 48 Kan. 580, 30 Pac. 20. In the case last cited the court said:

“ ‘Unless a very strong showing is made, or this court is satisfied that the discretionary power has not been properly exercised, the conclusion below will not be disturbed.’ ”

While the question of procedure is one which is to be determined in the light of the federal precedent, it is worth while to call the attention of the court to the fact that the rule as announced by the Washington Supreme Court is in substantial accord with the foregoing authorities.

Cameron vs. Groveland Improvement Co.,
20 Wash. 169, 170.

In this case Mr. Justice Reavis said:

“The superior court appointed a receiver pending the trial of the cause.

“The rule which this court observes in reviewing an order of the superior court appointing a receiver has been stated in *Roberts vs. Washington National Bank*, 9 Wash. 12 (37 Pac. 26) :

‘The making of such orders is committed, under our system, to the sound discretion of the judge before whom the proceeding is pending, and his decision of the question must stand, unless the appellate court, upon an examination of the law and facts of the case, shall affirmatively determine that his action was not warranted; and in determining this question, the decision of the questions of fact will not be reversed if there is a substantial conflict in the proofs in regard thereto. But the appellate court must examine such proofs for the purpose of determining whether or not there is such a clear preponderance against the determination of the lower court’.”

For other authorities to the same effect see

4 Pomeroy's *Equity Jurisprudence*, 3d Ed., Sec. 1331.

Corning vs. Siesel, 101 Ga. 389; 28 S. E. 861.

POSITION OF APPELLANTS.

It is only because of the discretionary character of the relief that these appellants had any right to a hearing in the court below. They were not parties to the foreclosure bill, they were merely a minority, both in number and amount, of the creditors of the S. E. Slade Lumber Company, whose claims were

secured by a third mortgage on its properties. The third mortgage is a part of the record and by its express terms it vests the trustees under the mortgage with the exclusive right of action thereunder. This is plainly the effect of the following language taken from the mortgage:

“The parties of the second part shall have the exclusive right of action hereunder, and no party hereby secured shall be entitled to commence any action to enforce these presents, unless the parties of the second part shall refuse or fail so to do when properly thereunto requested.” (Record 197.)

The mortgage itself is collateral to a creditors' agreement, under which these appellants have virtually turned over the control of their claims to a committee of creditors consisting of George A. Kennedy, P. E. Bowles and A. P. Welch. This creditors' agreement is also a part of the record. The agreement contains the following language :

“The said George A. Kennedy, P. E. Bowles and A. P. Welch, their successor or successors, shall have power only to act unanimously and not by a majority.” (Record 166, 167.)

Mr. P. E. Bowles and Mr. A. P. Welch, two of the three making up the creditors' committee, have joined with plaintiffs in the case at bar in requesting the court to grant the receivership. Mr. George A. Kennedy, one of the three trustees under the agreement, is in sympathy with the position of appellants. Appellees did not raise this question in the

court below, being of the opinion that the court, in passing upon an original application for the appointment of a receiver, should listen to any representations made by anyone in anywise interested in the property. It by no means follows that these appellants are to be deemed parties to the suit in such sense that they have a right to review on appeal the action taken by the lower court. Certainly this court should not set aside the receivership order passed by Judge Cushman at the instance of parties situated as these appellants are, in the absence of an overwhelming showing as to the folly of the order and the injustice done thereby.

UNCONTROVERTED FACTS.

The record in this case is in such condition that appellees are entitled to claim that they have prevailed on all of the controverted questions of fact, but the uncontroverted and indisputable facts are sufficient to justify the receivership order from which this appeal is taken. These facts must certainly be deemed to be established by the record.

1. If the property of the S. E. Slade Lumber Company is sold at forced sale its value cannot be secured, and the proceeds of the sale in the absence of a bid made by one or more of the mortgagees, will probably be inadequate to the payment even of the first mortgage.

2. The timber lands of the S. E. Slade Lumber Company, if their value shall be conserved and realized, are much more than sufficient to pay the first

and second mortgages, and are probably sufficient to pay the third mortgage as well. The Aberdeen properties of the said defendant are worth a large sum of money, in all probability a sum sufficient to take care of any possible deficiency remaining due to the creditors under the third mortgage after the disposition of the timber land, if the value of the timber is conserved and realized.

3. The Slade Lumber Company is wholly without available resources. It is wholly unable to pay taxes upon its properties, or to meet the other expenses incident to their care and protection.

4. In the absence of some arrangement under which the taxes on the property can be paid the property will be sold for delinquent taxes, and lost to all of the parties to this suit.

5. The mill property, while intrinsically valuable, imperatively demands care. In the absence of proper care and protection by insurance and otherwise there are many chances that this asset will be lost by fire. The Washington statute, 1 Remington & Ballinger's Code, Section 741, provides in part as follows :

“A receiver may be appointed by the court in the following cases :

“4. In an action by a mortgagee for the foreclosure of a mortgage and the sale of the mortgaged property, when it appears that such property is in danger of being lost, removed, or materially injured.”

6. Under the contract which the receiver has made, pursuant to authority given by the court, the timber will net the estate at least \$3.00 per thousand feet. Under the Lacey cruise this means that the estate will receive upwards of \$1,500,000.00 from the logging operations alone. This sum is much more than sufficient to pay all three mortgages.

7. The receivership is requested by the owner of the equity of redemption, the first mortgagee, the second mortgagee, and by a majority, both in number and amount, of the creditors secured under the third mortgage.

8. The contract under which the receiver is logging the lands involves no risk of receivership indebtedness paramount to the liens now subsisting on the property.

9. The contract with Humptulips Logging Company assures to the creditors of the S. E. Slade Lumber Company the full market value of the property.

It would be difficult to find a case in the books under which it has been held that a receivership is improperly granted under such a showing as that above recited. The Washington statute quoted above is declaratory of a principle of equity jurisprudence which is well established. Where, for any reason, the mortgagor is unable to take care of the property, a receiver is properly appointed at the instance of the mortgagee to prevent waste.

It is true that under the laws of Oregon and Washington the courts will not appoint receivers in foreclosure suits simply because the mortgage so stipulates. This has been determined by the Federal Supreme Court in

Teal vs. Walker, 111 U. S. 242, 251,
and by this court in

Couper vs. Shirley, 75 Fed. 168.

The opinion in the latter case begins by calling attention to the fact that the receivership in that case was claimed solely on the ground of the stipulation contained in the mortgage, and the decision is merely to the effect that such a stipulation will not be honored as of course by the courts. The decision does not modify the well settled principles of equity jurisprudence on which we rely in the case at bar. The principle of the two Federal decisions above referred to is recognized by the Supreme Court of the State of Washington, and it is nevertheless held by that court that in a foreclosure suit a receiver will be appointed whenever such action is necessary to prevent waste.

Collins vs. Gross, 51 Wash. 516.

A court of equity is always concerned for the conservation of assets over which it has acquired jurisdiction. When necessary to such conservation the court will appoint a receiver and will authorize him to conduct the business.

Cake vs. Mohun, 164 U. S. 311, 315 to 316.

This court upheld the appointment of a receiver, who was authorized to operate a cannery, where the order of the lower court was based upon a proper showing to the effect that the operation of the cannery was essential to preserve the asset over which the court had acquired jurisdiction.

Pacific Northwest Co. vs. Allen, 109 Fed. 515.

In response to the suggestion made by appellants, that this court will never appoint a receiver to operate a business which is not a going concern at the time when the receiver is appointed, we cite

Elk Fork Co. vs. Foster, 99 Fed. 495, 497.

In this case a receiver was authorized and directed by the court to continue the work of prospecting and exploration on the defendant's properties for the purpose of discovering oil and gas thereon, and was authorized to operate any oil wells which were the result of his exploitation. This order was approved by the Circuit Court of Appeals for the Fourth Circuit. On this branch of the case appellants rely on

High on Receivers, Sec. 36.

The text is based wholly on the case of

Merrill vs. Pemberton, 62 Ga. 29.

This was a case in which the lower court was asked to appoint a receiver who should take over

certain formulae or prescriptions for the manufacture of patent medicine. The court was asked to authorize the incurring of indebtedness to start a manufacturing plant to engage in the patent medicine business. The formulae were secret and a part of the relief requested was that the defendant should be required to disclose the formulae to the receiver. Such a receivership, and such a form of relief were properly denied.

If it be said that the receivership granted in the case at bar will continue for an unreasonable length of time, we answer that the contract entered into between the receiver and the Humptulips Logging Company is subject to cancellation on sixty days' notice (Record 114). The presumption is that the lower court will direct a cancellation when the interests of the estate so demand. In this connection we call attention to the affidavits of John C. Ainsworth (Record 264) and W. J. Patterson (Record 274) and C. M. Weatherwax (Record 266) to the effect that in their opinion it will be possible to refinance the indebtedness of the S. E. Slade Lumber Company approximately within two years, if the operations of the receivership shall make such a showing as these witnesses anticipate. Issue has not been joined on the allegations of these affidavits, and they are, therefore, entitled in this court to full faith and credit. In view of the fact that these appellants are not entitled to a foreclosure of the third mortgage, because of the conditions of the mortgage and of the creditors' agreement collateral thereto,

it certainly cannot be held that the lower court is doing them an injustice in permitting the logging of the property for a period not exceeding two years under conditions which assure that the full market value of the timber will be secured and applied to the liquidation of lien indebtedness admittedly prior to that of these appellants.

The paramount objection to the operation of a business under a receivership is the possibility of creating new lien indebtedness to which the other indebtedness of the defendant must be postponed. In the case at bar that danger is guarded against. The Humptulips Logging Company is financially responsible. This appears from the showing made in support of the receivership, and is in nowise controverted. Under the contract with the Humptulips Logging Company there is assurance that the creditors will receive \$3.00 per thousand feet for all logs cut on the mortgaged lands. It is hoped that the payments may exceed this amount, but the showing is that this amount represents the full market value of the timber, and the contract is drawn in such a way as to absolutely assure the payment of this amount in reduction of the lien indebtedness. Subsequent encumbrancers receive all the relief to which they are entitled if they are assured that the assets of the debtor will be applied in reduction of a prior lien.

United States vs. Masich, 44 Fed. 10.

It is contended that a receivership will in no case be granted in a foreclosure suit unless there is

a showing as to the inadequacy of the security. The cases relied upon on this branch of the case will all be found to be cases in which the owner of the equity of redemption resists the appointment of a receiver. The authorities relied on by appellants are not in point because of the fact that the mortgagor, the first and second mortgagees, and a majority, both in number and amount, of the beneficiaries of the third mortgage, join in the request that this receivership be continued. The case of

Warner vs. Gouverneur, 1 Barb. 36,

is a case in which the mortgagor and his successors in interest were strenuously resisting the receivership. The case is therefore distinguishable from the case at bar.

RIGHTS OF FIRST MORTGAGEES PARAMOUNT.

The authorities clearly recognize that the rights of the first mortgagee are paramount. Where a receiver has been appointed in a suit brought by the second mortgagee for the foreclosure of his mortgage, such receiver will be displaced and a receiver appointed at the instance of the first mortgagee when he brings his suit to foreclose.

Schneider vs. Miller, 155 Wis. 239; 144 N. W. 286.

The receivership was granted in the first instance by the court without objection from any source. These appellants then came into court pray-

ing for a modification of the receivership order, and subsequently for a quashing of the receivership order. At the time when these applications were made to the lower court the property was in the possession of a receiver appointed at the instance of the first and second mortgagees, with the consent of the mortgagor and with the approval of a majority in interest of the beneficiaries under the third mortgage. The case therefore is closely analogous to that of a mortgagee in possession. It is well settled that a court of equity will not disturb the possession of such a mortgagee so long as his debt is unpaid.

High on Receivers, 4th Ed., Sec. 679.

United States vs. Masich, 44 Fed. 10.

Trenton Co. vs. Woodruff, 3 N. J. Eq. 210.
212.

It is well settled that a subsequent mortgagee may, through the aid of a court of equity, redeem from the first mortgage where the first mortgagee is endeavoring to enforce his lien.

Frost vs. Yonkers Bank, 70 N. Y. 553.

Ellsworth vs. Lockwood, 42 N. Y. 89, 96.

2 Jones on Mortgages, 1064.

2 Story's Equity Jurisprudence, 1023.

It is possible that these appellants, because of the conditions contained in the third mortgage, and the creditors' agreement appurtenant thereto, would be denied the right of such redemption, but the first and second mortgagees, who are parties to this ap-

peal, hereby expressly stipulate of record that they will consent that such redemption shall take place, if these appellants shall elect to take over their liens, together with the costs and expenses of the litigation up to date. We submit that the remedy of these objecting creditors is to redeem from the two first mortgages, and thus control the foreclosure proceedings. After such redemption they would undoubtedly be in the position to ask the court to discharge the receiver, but in the absence of such redemption the paramount care of the court should be to protect the rights of the first and second mortgagees.

Trenton Company vs. Woodruff, 3 N. J. Eq.
210, 212.

In this case the court said :

“The most important question, is that which relates to the appointment of a receiver of the property covered by the bank’s second mortgage, and which is also embraced in the mortgage set up by the trustee. If the trustee is to be considered as a first mortgagee in possession, the case is plain. There can be no receiver as against him. He is entitled to the possession, having the first or legal mortgage, and can only be required to apply the rents and profits to the payment of the debt. The second mortgagee has no remedy, except to redeem. And the rule is so firmly settled, that in *Quarrel vs. Beckford*, 13 Vesey, 378, Lord Eldon said, that if Beckford the first mortgagee, would swear there was any sum due him, and his mortgage was not satisfied he would not take away the possession from him. And in *Barney vs. Sewell*, the same learned chancellor says, ‘I know of no case where the

court has appointed a receiver against a mortgagee in possession, unless the parties making the application will pay him off, and pay him off according to his demand, as he states it himself. I cannot appoint a receiver against these defendants, unless you can bring me their confession that they are paid off, or their refusal to accept what is due to them:' 1 Jac. and Walk. 627."

RELATIVE EQUITIES.

We have found great difficulty in finding authorities parallel with the case at bar. The large majority of cases are cases in which the owners of the equity of redemption resisted the receivership. The strength of the position of the appellees in this case consists largely in the fact that the mortgagor not only consented to the receivership but earnestly desires the court to uphold it. A case somewhat in point is

Philadelphia Co. vs. Oyler, 61 Neb. 702; 85 N. W. 899.

This was a foreclosure suit; a receiver was appointed on the application of the mortgagor and one of his grantees who had assumed the payment of the mortgage debt. The first mortgagee joined in the prayer for a receiver. The receivership was resisted by a second mortgagee to whom the lease on the premises had been assigned. There was a showing of waste in that the owner of the equity of redemption was unable to pay the taxes. The court held that the receivership was proper.

The following from the opinion is in point as to the relative equities of the parties :

“As between the subsequent mortgagee and persons liable personally for a deficiency, the equities are in favor of the latter, who should be relieved of liability before the property or the income therefrom should be taken to satisfy the debt due under the subsequent mortgage. The statute does not restrict the application for a receiver to a plaintiff, nor is it believed such was intended by the legislative enactment. A defendant may, in a proper case, be heard to make such an application. A receiver will be appointed when justice and equity will thereby be promoted (Beach, Rec. 12). * * * * *

It would be, it seems to us, permissible for a mortgagor of premises afterwards conveyed to a third party, and which secured a debt upon which he was personally liable, in an action to foreclose such mortgage, and where waste or inadequacy of security is made the basis, to apply for a receiver of such premises for the purpose of having the debts satisfied out of the property pledged to their payment according to priorities, regardless of the question of his solvency and liability to meet a deficiency by reason of his personal liability, and in this case we hold that the mortgagor and grantee had such a substantial and beneficial interest in the suit by reason of their personal liability for the debt as would give them a standing in a court of equity for the purpose of applying for a receiver to take charge of and preserve the mortgaged property, and apply the income to the payment of taxes or in satisfaction of the mortgage debt, and thus lessen their liability, and save them from injury by reason of a judgment for deficiency.”

Tysen vs. Wabash Railway Company, 24 F. C. 479.

This was a decision passed by Mr. Justice Harlan, sitting in the Circuit Court for the Southern District of Illinois. The case grew out of a dispute between the bondholders of the Wabash Ry. Co. A large majority of the bondholders had worked out a funding scheme which was considered by them to be the best arrangement for all concerned. The minority of the bondholders were given an opportunity to co-operate and be protected by this scheme; they refused to do so and brought a suit to foreclose the mortgage. In this suit they applied for a receiver. Mr. Justice Harlan said :

“Upon examination of these and other authorities cited, it will be found that the action of the court has depended largely upon the peculiar circumstances of each case. In no instance has the action of the court, in appointing or refusing to appoint a receiver, rested exclusively upon the technical, legal rights of the parties.

“The rule deducible from the cases, and which commends itself to my judgment as sound, especially in suits to foreclose railroad mortgages, is well stated in the case of *Vose vs. Reed* (Case No. 17,011), where this language is used by Mr. Justice Bradley: ‘The next question is, whether the court will appoint a receiver. This is a matter always in the discretion of the court, but as a general rule a receiver will be appointed for the purpose of protecting the fund when the complainant has an equitable interest in the subject, and the defendant having possession of the property is wasting it, or removing it out of the jurisdiction of the court. But all the circumstances of the case are to be taken into consideration, and if the case be such that a greater injury would ensue from the appointment of a

receiver than from leaving the property in the hands now holding it, or if any other considerations of propriety or convenience render the appointment of a receiver improper or inexpedient, none will be appointed'."

After stating these general principles which govern the courts in the appointment of receivers, the court outlines the contentions of the minority bondholders. These contentions would seem at first blush to be reasonable and tenable. After stating them the opinion continues :

"Upon the other hand, we find the vast majority of the bondholders, under all the mortgages, insisting that the funding scheme is the best arrangement for all concerned, and that under that arrangement, faithfully and honestly carried out, the rights of all parties will be best secured. The company invites complainant and those now standing with him to join in that scheme with the large majority of those who have the same character of rights with them. That that scheme is being honestly adhered to, and will be carried out in good faith, the evidence does not permit me to doubt. I will not stop to state in detail all the reasons arising out of the evidence for the conclusions I have reached. * * * * *

"If the present management of the road were guilty of any fraud or dishonest practices in their control of this property, I should feel differently. While there are differences between them and some of the bondholders, as to certain matters connected with the discharge of the company's obligations, those differences do not involve the integrity of those operating the railroad. The court is disposed to recognize the absolute necessity of large discretion in the man-

agement of such vast property, and in the distribution of the net income arising therefrom, and it is unwilling, for the present at least, to make honest differences as to such matters, the basis for its interference by the appointment of a receiver."

If the court will apply the principles announced in the foregoing decision to the facts in the case at bar, we think the conclusion will be irresistible that the decree appealed from should be affirmed. The scheme approved by the lower court offers an opportunity to the mortgagor to save what the mortgagor regards as a large equity. It offers the only reasonable chance of paying the second and third mortgages. The scheme has been consented to by the first and second mortgagees and by a majority, both in number and amount, of the beneficiaries under the third mortgage.

In view of the doctrine of the two cases last cited, and in view of the large discretion accorded by the law to the court of original jurisdiction, we submit that it would be a harsh rule to set aside this receivership and require a sacrifice sale of the mortgage security.

APPELLANTS' BRIEFS.

We have read appellants' briefs with much interest. The learned counsel for appellants have ably and forcefully presented all that can be said on their side of this controversy, but they have shown no ground for reversing the discretionary action of the lower court.

Appellants cite International Trust Company vs. Decker, 152 Fed. 78; Dalliba vs. Winschell, 11 Idaho 364, 371; First National Bank vs. Cook, 2 L. R. A. (N. S.) 1025; Wiggins vs. Neversink Company, 93 N. Y. Supp. 853; Hanna vs. State Trust Company, 70 Fed. 2, 8. Appellees have no quarrel with the rule announced in the foregoing authorities. The doctrine as stated by Judge Wolverton in the first of the foregoing cases is undoubtedly the law. The expenses of a receivership created at the instance of general creditors will not be permitted to displace mortgage liens except in the case of public service corporations, whose continued operation is a public necessity. We fail to see the relevancy of this principle to the case at bar. The contract authorized by the lower court assures to the receiver three dollars per thousand feet for all logs cut on the mortgaged premises. So long as the Humptulips Logging Company carries out its contract the operations will insure to the receiver the foregoing sum of money, over and above all expenses. It is probable that the operations will yield a larger sum of money. Whatever is realized will be devoted to the payment of the mortgage indebtedness in the order of its priority. As has been repeatedly pointed out by us, three dollars per thousand feet is the full market value of the stumpage.

It appears affirmatively that the Humptulips Logging Company is in sound financial condition and able to carry out the obligations assumed by it in its contract. Patterson affidavit, Record 274. The al-

legations of this affidavit are not controverted by appellants and are therefore established as a part of the record on this appeal. How, then, can the operations authorized by the lower court result in the creation of receivership expenses to the prejudice of the mortgagees? This is nowhere pointed out in appellants' briefs. If such result were possible it would still be competent for the lower court to direct the receiver to rescind the contract on sixty days' notice to the Humptulips Logging Company. It would be the disposition of the receiver and the mortgage creditors at whose instance he was appointed so to rescind if at any time it appeared that the operations were wasteful or disadvantageous to the estate.

The foregoing discussion of the facts of this case suffices to distinguish it from *Farmers' Company vs. Grape Creek Company*, 50 Fed. 481. The whole care of the court in that case was to avoid the creation of liens which would take precedence over mortgages. The question in that case was not whether a receiver should be appointed, but whether a receiver already appointed should be authorized to operate certain mines. Such operation involved risk of loss and the court refused to authorize it.

Gutterson vs. Lebanon Company, 151 Fed. 72, 74.

The suit in this case was brought by general creditors, for the purpose of conserving assets and liquidating an insolvent corporation. A receiver was

appointed and his operation of the property proved unprofitable. The case before the court had to do with these receivership obligations. The receiver's mismanagement was proved and he was personally charged with a part of the indebtedness.

The argument of appellants on this branch of the case is predicated on their contention that the operation of the property authorized by the lower court will prejudice their equity of redemption. But how? What is the equity of redemption of a third mortgagee? How can he be prejudiced by any disposition of the security which assures that its full market value will be applied on the reduction of lien indebtedness admittedly prior?

United States vs. Masich, 44 Fed. 10.

The right of the third mortgagees in the case at bar is to redeem from the first and second mortgages and to be subrogated through such redemption to the rights of the first and second mortgagees.

If it be said that such redemption would require appellants to raise a large sum of money, we answer that they will be required to raise this same amount of money in order to protect their lien if the receivership is abrogated and the property sold without delay at master's sale, pursuant to their contention.

If the logging operations now in progress were to result in denuding the property of its timber without reducing the mortgage indebtedness, we can see how appellants would be injured by the order ap-

pealed from, and if such could be the result of these operations no one would object more strenuously that the first and second mortgagees and the creditors secured under the third mortgage who are in accord with the receivership program. But it is established by overwhelming testimony that three dollars per thousand feet is the full market value of the timber, and the contract authorized by the lower court assures the payment to the mortgagees of three dollars per thousand feet on all logs cut on the mortgaged property.

We think it unnecessary to notice all of the authorities cited in appellants' briefs. They are all cases in which the mortgagor resisted the receivership. In our case the mortgagor asks the receivership.

Eureka Company vs. Lewiston Company,
12 Idaho 472.

This case, cited by appellants, was a suit to foreclose a chattel mortgage on a steamboat. The receivership was asked of the Supreme Court pending an appeal. The court held that the failure of the mortgagor to keep the boat insured did not constitute waste per se. This circumstance was nevertheless held to be important as bearing on the right to a receivership, and the court approved the case of Winkler vs. Madburg, 76 N. W. 332, where under a different state of facts such failure to maintain insurance was held to constitute waste.

Little Warrior Company vs. Hooper, 17
Southern 118, 119.

In this case a receiver had been appointed without notice at the instance of a stockholder and creditor. The case was one of disagreement in the internal management of a corporation. There was no allegation of insolvency. The receivership order was reversed; the corporation strenuously resisted the receivership.

Etowah Company vs. Wills Valley Company, 17 Southern 522.

In this case a receivership was sought by creditors and the debtor corporation resisted the application. The allegations on which the receiver was appointed in the lower court were not sustained by the evidence and the receivership order was reversed.

Ferguson vs. Dickinson, 138 S. W. 221.

In this case a creditor protected by a vendor's lien and also by a chattel mortgage claimed a receivership; the mortgagor resisted the application and offered to keep the property insured in such sum as the court should order. Under the Texas law the mortgagor is entitled to possession of the mortgaged property until the sheriff's deed issues. It was held that under the facts appearing in that case there was no justification for depriving the mortgagor of the possession of the property.

The remaining cases cited by appellants have been noted in the earlier part of this brief or are so clearly distinguishable from the case at bar that they call for no comment on our part. In view of

all of the circumstances which we have emphasized, we contend that the court would grievously err if it disturbed the order appealed from and required the property of the mortgagor appellee to be sacrificed at foreclosure sale.

Respectfully submitted,
SNOW, McCAMANT & BRONAUGH,
Northwestern Bank Bldg.,
Portland, Ore.
BRIDGES & BRUENER,
Aberdeen, Wash.
Attorneys for Appellees.

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In the United States
Circuit Court of Appeals

For the Ninth Circuit

THE FIRST NATIONAL BANK OF SAN
FRANCISCO, *et al*,

Appellants,

—VS.—

DETROIT TRUST COMPANY, *et al*,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE
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WASHINGTON, SOUTHERN DIVISION.

Brief of The American National Bank
of San Francisco, *et al*.

Filed

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F. D. Monckton,
Clerk.

THEO. B. BRUENER,
J. B. BRIDGES,

*Attorneys for The American National Bank
of San Francisco, et al.*

Aberdeen, Washington.

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**Brief of The American National Bank
of San Francisco, et al.**

The undersigned, on behalf of The American National Bank of San Francisco, Welch & Company, Slade-Wells Logging Company, United States National Bank of Portland and Humptulips Logging Company, being a majority both in number and amount of the beneficiaries under the third mortgage, beg to submit the following observations in connection with the brief filed on behalf of the appellees.

After the District Court made its order *sua sponte* (R. 295) the beneficiaries above named filed an answer to the petition of First National Bank of San Francisco *et al*, which clearly sets forth the position of said beneficiaries (R.130). These beneficiaries were not made formal parties to the appeal, but we presume that their brief will be considered by the court, provided any of the beneficiaries under the third mortgage have a right to be heard in this court.

For a statement of the facts we beg to refer to the brief filed on behalf of the appellees.

The creditors' agreement of April 30, 1915, to which the beneficiaries above named and all the appellants were parties, was entered into for the purpose of protecting the interests of the then unsecured creditors of the S. E. Slade Lumber Company. (R. 160) These creditors realized that the Lumber Company could not meet its obligations due under the first and second mortgages, and that if the first and second mortgagees foreclosed their mortgages the claims of the unsecured creditors would be worthless. It was agreed, therefore, that the creditors signing the creditors' agreement should advance, for a period of one year and provisionally for a period of two years, the necessary moneys to pay the taxes and insurance premiums on the property of the Lumber Company, and the interest due and

to become due under the first and second mortgages. These payments, aggregating about \$75,000, were actually made for a period of one year, each party to the creditors' agreement advancing its proportion of the money, and in consideration of such payment Detroit Trust Company agreed not to enforce the payment of the principal of the maturing bonds during that period. The underlying purpose of the creditors signing said agreement was to secure time in which the properties of the Lumber Company, and more particularly its timber lands, could be sold to advantage and thus secure enough money to pay off the first, second and third mortgages. During the year in which the creditors made the advancements aforesaid, strenuous efforts were made by the Lumber Company and by timber brokers to sell the timber lands of the Lumber Company at a price of \$2.35 per M. This was done with the consent of the beneficiaries. The efforts to sell, however, proved fruitless, and when the creditors at the expiration of the year refused to advance further moneys towards the payment of taxes, insurance premiums and interest, foreclosure of the first and second mortgages was unavoidable.

By the terms of the creditors' agreement it was contemplated that a third mortgage should be given to First Federal Trust Company as Trustee, for the purpose of securing the claims of the unsecured

creditors of the Lumber Company. This mortgage was duly given. (R. 168) By the terms of the creditors' agreement a committee of the creditors consisting of Geo. A. Kennedy of The First National Bank of San Francisco, P. E. Bowles of The American National Bank, and A. P. Welch of Welch & Company, was appointed to control and manage the claims of all creditors signing said creditors' agreement, and it was agreed that said committee and their successor or successors should have power only to act unanimously and not by a majority. (R. 166) This creditors' agreement was the working agreement under which the claims of said creditors secured under the third mortgage should be handled and protected. The third mortgage specifically provides that the Trustee shall have the exclusive right of action thereunder and be under no duty to act unless requested by the three representatives above mentioned. (R. 196) In view of these facts we are unable to see by what right the appellants herein wage their contest. They have made a contract in which they turned over their claims to a certain committee. The fact that unanimous action of the committee could in this instance not be secured, does not give them the right to overthrow the contract and proceed on their own motion. The situation is similar to cases where bondholders have agreed to

be bound by the action of certain of their number. Such contracts have been universally upheld.

Chicago R. Co. v. Fosdick, 106 U. S., 47.

Shaw v. Little Rock R. Co., 100 U. S., 612.

Canada Southern R. Co. v. Gebhard, 109 U. S., 527.

Guilford v. Minneapolis R. Co., 48 Minn., 560.

Gates v. Boston Air Line R. Co., 53 Conn., 346.

Boley v. R. Co., 64 Ill. App., 313.

Muren v. Southern Coal Co., 177 Mo. App. 600; 160 S. W., 835.

Batchelder v. Council Grove Water Co., 131 N. Y., 42; 29 N. E., 801.

Aside from the creditors' agreement we can not conceive of any valid reason why the rule of majorities should not apply. Control must rest somewhere. If a minority secured under a trust mortgage can enjoin action about to be taken by a majority in good faith, then the minority would control or there would be confusion and finally resort to the courts.

Shaw v. Little R. Co., *supra*.

Wheelwright v. St. Louis Transp. Co., 164 Fed., 164, 166.

The beneficiaries under the third mortgage, and the mortgagor S. E. Slade Lumber Co., are probably more vitally interested in this proceeding than the

first and second mortgagees. It is admitted on all sides that if the property is forced to sale the first mortgagee will be compelled to buy it in payment of its first mortgage. The testimony conclusively shows that if the properties of the Lumber Company are not forced to sale, but full value can be secured therefrom, enough money will be realized to pay the claims of the first, second and third mortgagees and leave an equity for the mortgagor; that only by the immediate cutting and marketing of the timber can the full value of the timber holdings of the Lumber Company be secured for the creditors; that the appointment of a receiver with power to operate is the most advantageous plan to adequately conserve the properties of the Lumber Company. (R. 257) The testimony further shows that there is constant and great danger of fire to the timber, as well as to the twelve million feet of Fir logs which were left lying on the ground by the Warren Company, and which logs are daily deteriorating in value and soon will be of no value unless brought to market and sold. (R. 260). The testimony further shows that the Warren Co. spent a great deal of money in opening up these timber lands and that numerous skid-roads have been constructed on the property, and that the money so spent will be entirely lost unless provision is made for the immediate logging of the timber. (R.260) It is also shown that there is on

the ground an extensive logging equipment belonging to the Humptulips Logging Company, which can be made available for the logging of the timber and which otherwise would be removed. It is further shown by the affidavit of Messrs. Weatherwax, (268) Ainsworth, (264) Patterson (274) and Paine (269) that it will not be necessary to pay all the debts of the Lumber Company from the moneys derived from the logging operations, but that within two or three years from the date of the making of the logging contract, providing the same is continued in force and carried out according to its terms, the indebtedness of the Lumber Company will be so materially reduced and the condition of the Lumber Company so largely improved that it will be possible to re-finance the obligations of the Lumber Company and provide for the liquidation of all its indebtedness; that within two or three years from the commencement of logging operations the value of the timber holdings of the Lumber Company will be demonstrated to such an extent to make possible the sale of the properties at a price more than adequate for the payment of the indebtedness of the Lumber Company.

Confronted with this situation the majority of the committee of creditors, as well as the majority both in number and amount of the beneficiaries under the third mortgage, thought it most advisable

from a business standpoint that a logging operation be conducted on the property, and to this scheme the first and second mortgagees consented. The minority member of the creditors' committee, as well as the minority of the beneficiaries under the third mortgage, were and are invited to join in this scheme to protect the interests of all parties concerned, but they have refused. The mortgagor joins in the scheme because only thereby can he hope to save an equity for himself.

We conceive it to be one of the highest functions of a court of equity in this case to conserve the properties of the Lumber Company and through its Receiver engage in such operations as will be to the best interests of all parties concerned.

In Alderson on Receivers, page 309 *et seq.*, it is said:

“Notwithstanding that it was said by Lord Eldon that ‘it was not the business of the court to manage or carry on from time to time a partnership of any kind, and that it was impracticable for the court to do so,’ and while a receiver of the effects of a business should ordinarily proceed and wind up the establishment without delay, cases sometimes arise in which the business should be carried on by him as usual, so that the good will thereof may be secured to the purchaser and the value of the establishment realized on such sale. (*Marten v. VanSchaick*, 4 Paige, 480.) This principle

has been applied in New York in cases in which newspaper property was involved, the receivers being authorized to conduct the publication of the newspapers until they could be sold. *Dayton v. Wilkes*, 17 How. P. R., 510. So also in England an order of the Vice Chancellor appointing a receiver with power to manage and carry on a newspaper was affirmed on appeal. *Kelly v. Hutton*, 17 W. R., 425, 427. * * * In modern practice receivers are frequently authorized to carry on business to preserve its value. *Blythe v. Gibbons*, (Ind.) 35 N. E., 557. * * * It is a matter of judicial discretion as to carrying on the business of the defendant, which will not be disturbed on appeal, except in case of flagrant error and injustice. *Wilmington Star Mining Co. v. Allen*, 95 Ill., 288."

It is earnestly contended in the briefs filed on behalf of appellants that these logging operations will continue for a period of ten years, and that a court of equity will never oversee or manage the business of a private corporation for such a length of time. Our answer to this contention is that it is not contemplated that the logging operations will continue for any such period. Prior to the beginning of logging operations by Humptulips Logging Company under its contract with the Receiver, the timber lands of the Lumber Company were a dead asset. They could not be sold except possibly at a great sacrifice. It is necessary, therefore, to demonstrate the value of these timber holdings, and this

can only be done by means of a logging operation conducted for a period of two or three years. The purpose of these logging operations is to save the millions of feet of Fir logs left lying on the land by the Warren Company when it ceased operations, to save the value of the numerous and expensive skidroads constructed by the Warren Company, and the large sums of money spent by that Company in opening up the property, to prevent the further deterioration and waste of the valuable sawmill plant of the Lumber Company, to prevent the impressment of tax liens on the property and to put the timber properties in such condition that they can be sold as a going concern—in other words, *the logging operations are being conducted to preserve the value of the estate for the purposes of sale.* The contract can be cancelled by the Receiver either on his own motion or by direction of the court on sixty days' notice, and when these properties can be sold by the Receiver to advantage this action will unquestionably be taken.

It is earnestly contended by counsel for appellants that a receiver will never be appointed at the suit of a mortgagee, unless it is shown that the security is inadequate. We admit this to be the general rule, but it has no application to the case at bar. This rule is for the benefit of the mortgagor. The law is zealous in the protection of the posses-

sion of the mortgagor until after sale, unless it is shown that the possession of the mortgagor must be interfered with for the protection of the mortgagee. In this case the mortgagor consents to the proceeding. The reason for the rule failing, the rule itself fails.

Title Ins. & Trust Co. v. California Development Co., 127 Pac., 503, 504.

The majority both in number and amount of the beneficiaries under the third mortgage having requested the court for the appointment of a receiver with power to operate, the situation is analogous to a case where subsequent mortgagees request the appointment of a receiver upon the ground that their security is inadequate for the payment of their claims. It is undisputed that the security is inadequate for the payment of the claims of the third mortgagee if the property is forced to sale.

We quote from Wiltsie on Mortgage Foreclosure, 3d Ed., Vol. 2, p. 1173:

“Subsequent mortgagees are entitled to the appointment of a receiver of the rents and profits of the mortgaged premises, on a petition showing that the mortgaged property is of less value than the amount of the encumbrances. *Buchanan v. Life Insurance*, 96 Indiana, 510; *Goddard v. Clark*, 116 N. W. 41.”

We further desire to call the attention of the

court to the fact that in this case the Receiver does not incur any indebtedness whatsoever. The entire cost of the logging operations are borne by the Humptulips Logging Co., which under the undisputed testimony is financially responsible. (R. 274) From the first moneys arising from the sale of logs the Receiver must be paid the sum of \$3.00 per M feet stumpage, which under all the testimony is the full market value of the timber. The question, therefore, whether or not receiver's certificates can be issued for the purpose of operating a business in the case of a mortgage foreclosure, which certificates shall be a prior lien to the mortgage indebtedness, is not before the court. The cases cited by counsel for appellants, therefore, to the effect that receiver's certificates for the operation of the property can not be issued and be made a prior lien on the property covered by the mortgages, are not in point. Were an attempt being made by the Receiver to issue receiver's certificates for a purpose other than the preservation of the property, the authorities cited by counsel would be pertinent, but not otherwise.

It is further contended that a court of equity has no power to appoint a receiver with power to operate pending a mortgage foreclosure, but that the functions of a receiver in such case are purely for the preservation of the property. In the first

place, we do not think that the powers of a court of equity are so circumscribed, and, in the next place, the power given to the Receiver in this case to enter into a logging contract is strictly for the preservation of the property and for the purpose of putting the property in such shape so that it can be sold to advantage, pay off the claims of all the mortgagees and leave an equity for the mortgagor. The confirmation of such project by the court commends itself to our minds as the exercise of a high degree of equity.

In Re Newdigate Colliery Ltd., 1 Ch., 468;
Ann. Cases 1912-C, 945.

Boyce v. Continental Wire Co., 125 Fed., 740.

Atlantic Trust Co. v. Chapman, 208 U. S.,
359; 52 Law Ed., 528.

Staples v. May (Cal.) 23 Pac., 711; 25 Pac.,
346.

Ohio Fuel Oil Co. v. Burdett (W. Va.) 79 S. E.,
667; Ann. Cases 1915-D, 1033.

Ellis v. Vernon Ice Co., 23 S. W., 858, 860.

Wagner v. Swift Iron & Steel Works, 26
S. W., 720.

In Re Newdigate Colliery, supra, the facts were that the mortgagor company issued three series of debentures secured upon its property. Default having been made in the payment of the interest, plain-

tiff, who was the holder of a large number of the first mortgage debentures, commenced an action on behalf of himself and the other first debenture holders to enforce their security against the company and the representatives of the second debenture holders. He immediately obtained an interlocutory order for the appointment of a receiver-manager of the property of the company, who proceeded to operate the mines and sell the coal. The question before the court was whether or not the receiver should cancel certain contracts which had been entered into by the company. The observations of the court with reference to the appointment of a receiver are valuable.

“The jurisdiction of the court to appoint receivers is extremely old, but I believe the practice of appointing a manager is far more modern, and I think it has been settled that the court will never appoint a person receiver and manager except with a view to a sale. The appointment is made by way of interlocutory order with a view to a sale; it is not a permanency. Take the case of an individual mortgagee of a licensed public house. If he is merely a mortgagee of the house he has no right to interfere with the good will of the business, except so far as he may do so by taking possession of the house. He can not get possession of the stock in trade or outstanding book debts or anything relating to the business which might be obtained by the appointment of a receiver and manager. Simi-

larly if he elects simply to take the appointment of a receiver of the property he obtains possession of the house through the receiver, and being in possession can do exactly what he likes with it, but he has no interest in the good will and he has no right to the stock in trade or book debts. If, however, he elects to take an order for the appointment of a receiver and manager of the licensed house—and it has been settled in comparatively recent years that he can do that—then I think he is in a different position. * * * But if he elects to have a manager appointed and takes upon himself, through the manager, the duty of carrying on the business, it is his duty to do nothing which will destroy, or prejudicially damage, the good will of the business at a time when it is not, and can not be, apparent that the mortgagor may not have a real interest in the equity of redemption both of the colliery itself and of the business.”

In the case of *Boyce v. Continental Wire Co.*, *supra*, the court in a mortgage foreclosure case appointed a receiver and ordered him to operate the plant of the Continental Wire Company in accordance with a proposition submitted by an independent corporation with the limitation that the mortgaged property should not be liable in any way for the expense of operation. This was done against the protests of the owner of all the bonds, who made the same objections to the operation of the plant by the receiver as are here made by appellants.

In the case of *Atlantic Trust Co. v. Chapman*, *supra*, the court, pending a mortgage foreclosure, operated the canals of the mortgagor for a period of three years. The question before the court was whether or not the plaintiff company was liable for the expenses of the operation of the property, the property finally not having been sold for enough to pay them. The observations of the court, however, are valuable.

“The motion for a receiver was to the end that the property might be cared for and preserved for all who had or might have an interest in the proceeds of the sale. The circumstances seem to have justified the motion, but whether a receiver should have been appointed or not was in the sound discretion of the court. Immediately upon such appointment and after the qualification of the receiver, the property passed into the custody of the law and thenceforward its administration was wholly under the control of the court by its officer or creature, the receiver. *Booth v. Clark*, 17 How, 322-331; 15 Law Ed., 164, 167. * * *

Still further, the court—if it had been proper under all the circumstances, to pursue such a course—could have refused to operate the canals in question at all and required the parties to proceed to a final decree of foreclosure and sale at the earliest practicable moment. But none of these things were done. Under the responsibility imposed upon it by law, the court determined to carry on the business of the Canal & Irrigation Company for a time.”

Apart from the inherent power of equity to appoint receivers, in this case we have also statutory authority. The Washington Statute provides that a receiver may be appointed:

“6. And in such other cases as may be provided for by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties.”

Sec. 741, Rem. & Ball.'s Code.

This statute applies with particular force to the present situation.

In this connection see *Boothe v. Summit Coal mining Co.*, 55 Wash. 167, 176.

In conclusion we desire to direct the attention of the court to the necessary result if the Receivership is now terminated and the first mortgagee ordered to proceed to a forced sale of the property. The first mortgagee will in all probability buy in the entire property for the satisfaction of its claim. This will leave in the beneficiaries under the third mortgage the naked right to redeem. During the period of redemption the property can not be logged. Aside from the constant danger of fire to the timber, the millions of feet of logs now on the lands of the Lumber Company will probably so have deteriorated that they will be valueless. A sale of the property at a price sufficient even to pay the beneficiaries un-

der the third mortgage a small amount on their claims seems not to be within the range of the probabilities. To make it possible to secure any amount toward the payment of their claims the beneficiaries under the third mortgage would be obliged to pay the claims of the first and second mortgagees, which is a very considerable sum. It is highly improbable that any of these beneficiaries would consider the redemption of this property from the first and second mortgages and assume the additional risk of getting their redemption money back. The mortgagor would unquestionably lose his entire equity.

The appellants have at no time suggested or offered any plan whereby the interests of the beneficiaries under the third mortgage can be better subserved than under the present plan, or at all, and we may rightly inquire of them now what plan do they offer. The appellants cannot possibly be injured under the plan as now devised and in operation. Under it the Receiver incurs no expenses, the timber is logged under his supervision and direction by Humptulips Logging Co., and the Receiver gets from the first moneys the full value of the stumpage, to-wit, \$3.00 per M, and if the log market justifies, obtains in addition all sums over and above the stumpage of \$3.00, the logging cost and compensation to the Logging Company. The appellants have failed to point out wherein any possible loss can ac-

crue to them by reason of the continuation of these logging operations for a period of two or three years, and until the property can be advantageously sold.

We believe that the equities of the case were fully and fairly stated by the lower court in its memorandum decision (R. 124) and that the decision of the lower court should be sustained.

Respectfully submitted,

THEO. B. BRUENER,

J. B. BRIDGES,

Attorneys for American National Bank *et al.*

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

THE FIRST NATIONAL BANK OF SAN FRANCISCO,
et al.,

Appellants,

vs.

DETROIT TRUST COMPANY, et al.,

Appellees.

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Southern Division.

ADDITIONAL BRIEF ON BEHALF OF APPELLANT
THE FIRST NATIONAL BANK OF SAN FRANCISCO

CUSHING & CUSHING,
821 First National Bank Building,
San Francisco, California,
Solicitors for Appellant,
The First National Bank of San Francisco.

The James H. Barry Co.,
San Francisco

Filed

FEB 8 - 1917

F. D. Monckton,
Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

THE FIRST NATIONAL BANK OF SAN FRAN-	} No. 2912
CISCO, et al.,	
vs.	
DETROIT TRUST COMPANY, et al.,	

Appellants,

Appellees.

Upon Appeal from the District Court of the United States for the
Western District of Washington, Southern Division.

ADDITIONAL BRIEF ON BEHALF OF APPELLANT
THE FIRST NATIONAL BANK OF
SAN FRANCISCO.

The undersigned on behalf of the appellant, The First National Bank of San Francisco, beg to submit the following observations in connection with the argument of Messrs. Hughes, McMicken, Dovell & Ramsey in their brief upon this appeal.

We also beg to refer to that brief for the statement of the case and the assignments of error.

We have here an ordinary suit to foreclose a mortgage covering a large tract of timber land and on a separate tract a saw-mill, etc. The land in question is covered by three mortgages: The first mortgage

being that sought to be foreclosed under the plaintiffs' bill; a second mortgage runs to the same parties plaintiffs for \$69,000, and for the purposes of our argument may be considered as part of the first mortgage. The third mortgage runs to the First Federal Trust Company and Milton R. Clark to secure an indebtedness of the S. E. Slade Lumber Company to several different creditors. The balance remaining unpaid under this third mortgage is in round figures about \$540,000.

When the bill was filed, the court, at the instance of the plaintiffs, appointed a receiver and authorized him to enter into a contract to log off the timber land and dispose of the timber, notwithstanding the fact that the Lumber Company had not been operating the property for a long time, in fact, since prior to the time of the execution of the third mortgage, and during all that time had been at a standstill. The receiver, pursuant to the authority of the court, entered into a contract to log off and sell the timber.

The mortgage sought to be foreclosed originally secured an indebtedness of \$1,000,000 (Tr., p. 19), of which \$450,000 was paid prior to the filing of the bill (Tr., p. 24), so that the indebtedness now secured by the mortgage is slightly over half of that originally secured. The mill properties alone are shown to have been appraised at approximately \$400,000 (Tr., p. 96). It is not claimed that there is any inadequacy of security for the payment of this first mort-

gage, and yet the court, through its receiver, proposes, at the instance of the first mortgagees, immediately to engage in the business for which the Lumber Company was organized, so far as the matter of logging and selling its timber is concerned, thus embarking upon an operation which, in the ordinary course of business, will continue for several years. Indeed if the property is logged at the rate of 50,000,000 feet per year (Tr., p. 106), as the stand of timber amounts to upwards of 500,000,000 feet (Tr., p. 152), we have a business to be carried on by the receiver which may cover a period of at least ten years.

It will be borne in mind, too, that the order appointing the receiver and granting to him these extensive and extraordinary powers, was made without notice to the trustees representing the third mortgage, and without any application on their part, and, as the record shows, at a time when no creditor secured by the third mortgage was seeking its foreclosure. These orders were made, so far as the appellants here are concerned, *ex parte*, and without any notice to them. As soon as the matter was brought to their attention, they took steps to have the orders withdrawn, and upon an adverse ruling being finally made, have prosecuted this appeal.

The case to our minds is a simple one involving, only, questions as to the power of a court of equity

in a foreclosure case, and as to the discretion with which that power is to be exercised.

As we understand it, the power of a court to appoint a receiver finds its roots in the necessity of protecting the interests of those concerned in the property by maintaining, so to speak, its *status quo*. So that, as has been said, it may be preserved for those entitled to it. In a foreclosure case where the mortgage security is adequate, the mortgagee ordinarily has no right to have a receiver appointed for the purpose of collecting rents, issues or profits, for the simple reason that he is adequately protected by his mortgage interest in the corpus of the property. Such is the case here, so far as the first mortgagee is concerned, and it must be remembered that it is at the instance of the first mortgagee that the receiver was appointed, and that thus far no other mortgage is sought to be foreclosed in this proceeding. Even if it be assumed that the subsequent mortgagees will appear and seek foreclosure of their liens, such assumption affords no ground for the present appointment of a receiver to operate the properties. It may be argued that in such a case as we have here, even though the security for the payment of the first mortgage be adequate, a receivership is necessary on the ground that there are no funds for the payment of taxes, or for the protection of the property by way of insurance, etc. A complete answer to such suggestion is found in the fact that the mortgagees under

the first mortgage have the right to pay such sums as may be necessary for these purposes, in which event they shall constitute a first lien on the property.

The Lumber Company ceased logging in May or June, 1914 (Tr., p. 280), and the mortgage securing the demands of appellants was executed about a year later (Tr., p. 168).

In these circumstances, as the first mortgage is more than adequately secured, and as the property was at a standstill when the third mortgage was taken, we submit that there is no warrant for the court to engage through its receiver in the business of logging. Indeed there is, we submit, no occasion whatever for the appointment of a receiver in this case.

But, in any event, we submit that the court has no power to authorize its receiver to commence business for the corporation, and thus impose new contractual obligations upon the parties, which they have not made for themselves. The power of the court, we take it, is measured by the requirements of the situation with respect to the preservation of the property, and does not go beyond that, and, as we have shown, there is ample power in the first mortgagees to protect this property without the aid of the court.

There are cases in which courts have, in foreclosure suits, authorized receivers to operate properties, but these very cases lay down the limits of the power of the court so clearly and limit the power so closely to the classes of cases in which it has been

exercised, and of which the case at bar is not one, that we think there is no difficulty in showing, from a few authorities, that the court exceeded its power in making the orders complained of here. The only cases in which receivers have been authorized to operate properties will be found to be cases where the property was in operation at the time of the receivership, and where the cessation of the business, whatever it was, would itself be destructive to the value of the property involved. The principal cases in which receivers have been authorized to carry on business for going concerns are those involving the operation of railroads, and in such cases, as is well known, the maintenance of the business as a going concern is justified in the interests, not of the parties litigant, but of the public. It is familiar knowledge that in many of such cases, perhaps in most of them, the operation by the receiver results in added burdens of debt against the property. As said by Mr. Justice Miller in his dissenting opinion in *Barton vs. Barbour*, 104 U. S., 126, 138, 26 L. ed., 672, 678:

“He [the receiver] . . . sometimes, though very rarely, pays some money on the debt of the corporation, but quite as often adds to the sum of these debts, and injures the prior creditors by creating a new and superior lien on the property pledged to them.”

Perhaps the leading case in this circuit is *International Trust Co. vs. Decker Bros.*, 152 Fed., 78. In

that case a receiver was appointed for a corporation owning certain mines, which had been mortgaged to secure a bond issue, and was authorized by the District Court to operate the mines, and for this purpose to issue receiver's certificates. The action was brought by a general creditor, alleging that the corporation was insolvent. After the receivership and such operation of the mines had continued for a period of more than eight years the District Court made an order of sale directing that all the properties be sold as an entirety. An appeal was prosecuted by the mortgagee from this order of sale. The opinion refers to the practice incident to railroad receiverships, whereby railroads are operated by receivers, and proceeds upon a full review of the authorities to hold that such practice has no application to corporations engaged in strictly private enterprises. The review of authorities in this opinion is so complete and the rule is therein stated with such finality by this court itself, that we are sure the court will prefer to examine the opinion itself, rather than any statement thereof that we might make.

In the case just referred to, the court refers with approval to *Dalliba vs. Winschell*, 11 Idaho, 364; 82 Pac., 107; 114 Am. St. Rep., 267, which is described in the opinion as "a very late and well-considered case." In that case the court said, 82 Pac., p. 109; 114 Am. St. Rep., 272:

“But for the court to go beyond the protection and preservation of an ordinary placer mine and assume to enter into mining operations and the running and conducting of a mine, as appears to have been done by the receiver in this case, is outside of the line of duty of courts of equity and of their receivers, and *this excessive exercise of jurisdiction* becomes dangerous when indebtedness thus incurred supplants prior existing mortgages and obligations upon the property.” (Italics ours.)

This court, in its opinion in the International Trust Company case, *supra*, said that eight years is too long for a court to hold a mining property in its custody, a view which seems particularly applicable to the situation here, for the contract made by the receiver in this case may continue the operation of the property for a period of upwards of ten years. The order of sale, obtained by the general creditor in that case, was reversed on the ground that full value of the property could be obtained only by foreclosure of the mortgage.

In the case at bar the order appealed from gives the receiver “full power to manage and operate all “or any part of the properties covered by said mortgage or deed of trust, either by logging contract or “otherwise, as he may deem advisable,” and also authorizes the receiver to enter into a contract for the logging of the timber. This, of course, is not for the purpose of taking care of and saving the property, for it amounts to an order of sale of the

whole mortgage security, not pursuant, however, to any decree of foreclosure. The standing timber, and not the lands, constitute the mortgage security. The order is therefore subject to the same infirmity that was found in the order reversed in *International Trust Co. vs. Decker Bros.*, that is, the only proper sale here, as there, is a sale pursuant to a proper decree of foreclosure.

Besides, it is submitted that the order appealed from goes away beyond the effect of an order authorizing the receiver to carry on the business of a going concern inasmuch as it permits the business to be initiated and continued by the receiver for a period of years. In other words, the business is not to be "carried on" to "protect and preserve the property," but is to be newly entered into and continued until the resources are exhausted to an extent sufficient to pay off plaintiffs' mortgage. This of course, is quite different from continuing a business *pendente lite* in order to keep it a "going concern." The order is without any precedent and squarely conflicts with the fundamental rule that a receiver of a private corporation in a foreclosure suit cannot in any event be given power to do aught but protect and preserve the property until a sale can be had pursuant to a proper decree of foreclosure.

In *First Nat. Bank vs. Cook*, 12 Wy., 492; 76 Pac., 674; 2 L. R. A. n. s., 1012, the court in proceedings in aid of execution appointed a receiver, who took

charge of a cattle ranch and other property already covered by mortgages. The court (2 L. R. A. n. s., p. 1025) cited with approval from another case the following language:

"A mortgage is a contract obligation, and it is as sacred as any other contract; and anything that destroys or impairs its lien destroys or impairs a contract. The reason that supports the excepted cases of railroads and some other business properties is that, they being charged with a duty to the public that is superior to any private obligations, the mortgage owner has knowledge when he invests that his security is liable to be displaced in favor of that first obligation. In no well-considered case that we know of has the power been exercised to the subversion of the rights of a prior mortgagee of purely private property, unless for very peculiar reasons."

In the note to this case, 2 L. R. A. n. s., 1063, it is said:

"The general rule is that a court of equity is not authorized to engage in carrying on business of private corporations and partnership affairs; . . ."

In *Wiggins vs. Neversink Light & Power Co.*, 93 N. Y. Supp., 853, the Supreme Court of New York held:

"In the case of corporations engaged in a public service, like railroad, water and lighting companies, and which service cannot be interrupted without inconvenience and harm to the community,

courts of equity authorize its receivers of such corporations to issue certificates of indebtedness to raise money to do repairs or obtain supplies to keep the service going, and make such certificates prior liens to the mortgage indebtedness.

But in the case of corporations not engaged in such a service, there is no such practice. It is justified only on the score of public necessity, and even when so exercised has become a great abuse and wrong to mortgage bondholders in many instances, as we all know." (Italics ours.)

In *Farmers' Loan & Trust Co. vs. Grape Creek Coal Co.*, 50 Fed., 481, it was held that a receiver could not be authorized to carry on the business of a private corporation against the opposition of twenty-five per cent. of its bondholders.

In that case the receiver of a coal mine, together with the holders of seventy-five per cent. of the bonds secured by a mortgage upon the property and the corporation mortgagor, joined in a request for an order authorizing the receiver to issue certificates, and to continue the operation of the mine. The court reviewed the authorities, pointed out the difference between the principles applying to railroad corporations and concerns affected with a public interest, and said, p. 482:

"Private corporations owe no duty to the public, and their continued operation is not a matter of public concern. It is only against railroad mortgages that the Supreme Court of the United States has sustained orders giving priority to receivers' certificates representing particular indebtedness,

and, as already stated, then only on principles having no application to a mortgage executed by a private corporation owing no duty to the public."

And again, p. 483:

"The court is not asked to subvert the lien of the mortgage on the ground that the trustee or bondholders have got possession of anything which, in equity, belongs to general creditors. It is to enable him to operate the mines for the benefit of bondholders, against the wish of part of them, that the receiver desires to be invested with authority to issue certificates which shall be a prior lien upon the property embraced in the trust deed. Extensive as are the powers of courts of equity, they do not authorize a chancellor to thus impair the force of solemn obligations and destroy vested rights. Instead of displacing mortgages and other liens upon the property of private corporations and natural persons, it is the duty of courts to uphold and enforce them against all subsequent incumbrances. It would be dangerous to extend the power which has been recently exercised over railroad mortgages, (sometimes with unwarranted freedom), on account of their peculiar nature, to all mortgages. The power does not exist, and the application is denied."

The views of the learned court in the case just cited are particularly applicable to the case at bar, and it will be observed that the court there held that it had no power to go into the business of coal mining as against the interests of even a part of the mortgagees. So we contend that here the court has

no power to go into the business of logging off this property.

Even if it were a matter of discretion, we submit that it would be an abuse of discretion to authorize such a contract.

Whatever discretion may be lodged in the trial court with respect to authorizing a transaction such as that involved here, it is clear that the order in question is not a proper exercise of such discretion. It is not claimed by the plaintiffs that they are not adequately secured by their mortgage. In other words, the making of this contract by the receiver is altogether unnecessary insofar as the satisfaction of plaintiffs' mortgage is concerned. It is evident that the ordinary foreclosure sale will result in their being paid in full. In these circumstances it is clear that the court had no discretion to approve the contract in question.

As is said in *High on Receivers*, Sec. 667, pp. 819, 820:

"And by inadequacy of security, within the meaning of the rule, is to be understood inadequacy as to the particular mortgage which is being foreclosed, and not as to other and subsequent mortgages."

What plaintiffs are trying to do is to pay off their mortgage by the unique method of bringing a foreclosure suit, but staying the foreclosure sale while in the meantime, although they must concede that

their security is adequate, a receiver, appointed at their instance, denudes the land of its timber, thus applying the real value of the property to the payment of the first mortgage lien, and leaving the almost worthless bare lands as security for the subsequent mortgages.

Such procedure, we submit, will not be permitted by this court.

It is respectfully submitted that the orders appealed from should be reversed.

CUSHING & CUSHING,
Solicitors for appellant, The First National Bank of
San Francisco.

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTH AMERICAN DREDGING COMPANY OF NEVADA, a Corporation, and CITY OF RICHMOND, a Municipal Corporation,
Appellants,

vs.

LUCIO M. MINTZER and MAURICIA T. MINTZER, as Executor and Executrix of the Last Will and Testament of WILLIAM MINTZER, Deceased,

Appellees.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

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Clerk.

United States
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Subpoena Ad Respondendum.

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California, Second Division.

IN EQUITY.

The President of the United States of America,
Greeting, to North American Dredging Company of Nevada, a Corporation.

YOU ARE HEREBY COMMANDED, that you be and appear in said District Court of the United States, Second Division, aforesaid, at the courtroom in San Francisco, twenty days from the date hereof, to answer a Bill of Complaint exhibited against you in said court by Lucio M. Mintzer and Mauricia T. Mintzer, as executor and executrix of the last will and testament of William Mintzer, deceased, who are citizens of the State of California, and to do and receive what the said Court shall have considered in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 14th day of May, in the year of our Lord one thousand nine hundred and fifteen and of our Independence the 139th.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the clerk's office of said court, pursuant to said Bill; otherwise the said Bill [1*] may be taken *pro confesso*.

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

Return on Service of Writ.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed subpoena ad respondendum on the therein named North American Dredging Company of Nevada, a corporation, by handing to and leaving a true and attested copy thereof with R. A. Perry, manager of the North American Dredging Company of Nevada, a corp., personally at Oakland, California, in said District on the 15th day of May, A. D. 1915.

J. B. HOLOHAN,
U. S. Marshal.
By I. W. Grover,
Office Deputy.

[Endorsed]: Filed May 17, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

[Title of Court and Cause.]

Bill in Intervention of City of Richmond.

Now comes the city of Richmond, a municipal corporation, and by leave of this Honorable Court intervenes in the above-entitled action, and files this its bill of intervention and alleges:

I.

That the city of Richmond, intervenor herein, is now and for more than five years last past has been a municipal corporation in the county of Contra Costa, State of California.

II.

That there now exists, and for more than twenty years last past there has existed, wholly within the limits of the said city of Richmond, a certain navigable channel which extends from San Pablo Bay in a northerly direction for a distance of about five thousand (5,000) feet; that said channel is a natural arm of said San Pablo Bay, which said San Pablo Bay is a navigable body of water within the State of California; that said channel is and during all the times herein mentioned has been of an average width of about one hundred (100) feet; that the depth of water in said channel varies with the rise and fall of the tide, and that an ordinary low tide said channel has a minimum depth of two (2) feet, and at ordinary high tide has a minimum depth of eight (8) feet; that said channel, which is known and designated as the South channel of the San Pablo Canal has for many years last past been navigated from San Pablo Bay to its northern extremity by

vessels both sail and steam, and has been during said time used for the purpose of conveying rock, gravel and merchandise of various kinds from other ports and places to the city of Richmond. That in order to improve the navigability of said channel and to render it more suitable for purposes of navigation and commerce, it became and is necessary to deepen said channel throughout its [3] entire length and to a width of eighty (80) feet, to a depth of eight (8) feet at ordinary low tide.

That the city of Richmond has a population of 20,000 or upwards, and contains within its limits a large number of extensive manufacturing plants and industries; that it is essential for the best interests of the city of Richmond, its inhabitants and the public generally, that the navigability of said channel be improved and increased as aforesaid, thereby affording better transportation facilities for the city of Richmond, its inhabitants and the public generally.

III

That heretofore, on the 2d day of July, 1914, the city of Richmond, upon due and proper application therefor, received from the War Department of the United States permission to improve the navigability of said channel by deepening the same as aforesaid.

That after proceedings duly and regularly had and taken, and after due and proper notice by publication calling for bids for the deepening of said channel, a contract for the improvement of said channel as aforesaid, was duly let by the city of Richmond to North American Dredging Company

of Nevada, a corporation, defendant herein, which said contract is now and ever since said last-mentioned date has been in full force and effect.

That if the relief asked for by plaintiffs in their bill filed in the above-entitled action, is granted, this intervenor will be greatly injured and damaged in this: that it will be unduly limited in its transportation and commercial facilities and its inhabitants, and the public generally will be deprived of a safe and convenient means of transporting freight and passengers between the city of Richmond and adjacent and other ports and places.

IV.

That for all the reasons above stated, said city of Richmond asserts and alleges that its interest in the subject matter embraced in the said bill in the above-entitled action is such that [4] it will suffer great loss and injury if it is not permitted to become a party to said action by this its bill in intervention.

V.

That William Mintzer was not at the time of his death, or at any other time, seized or possessed, or entitled to the seizin or possession of the lands and premises described in paragraph V of plaintiffs' bill, or any part thereof, nor since the 28th day of November, 1911, or since any other time or at all, have plaintiffs or either of them as the executor and executrix, or executor or executrix, of the last will and testament of William Mintzer, deceased, or otherwise, been or now are possessed or entitled to the possession of the lands described in said paragraph V of plaintiffs' bill or any part or portion thereof.

VI.

That this intervenor admits that on or about the month of April, 1915, defendant placed some small wooden bents on the property described in paragraph V of plaintiffs' bill, and strung high-power electric wires thereon, and in this behalf intervenor alleges that said bents were placed immediately adjacent to said south channel of San Pablo Canal and temporarily and necessarily for the purpose of carrying out its said contract with intervenor for the dredging of said channel.

VII.

That defendant has not brought a dredger in and upon, or in or upon said property, or any property of plaintiffs, or has not without right, or against the objections of plaintiffs, have begun to cut, dredge and excavate, or to cut, or dredge, or excavate, a ditch or canal eighty (80) feet in width and eight (8) feet in depth below low tide, or of any other width or depth whatsoever, or have carried away from plaintiffs' property the or any dirt or soil from said ditch or canal so cut, dredged and excavated; and in this behalf this intervenor alleges that pursuant to its said [5] contract with this intervenor the defendant about the 21st day of April, 1915, brought a dredger into and through said south channel of San Pablo Canal to the northerly end thereof, and since on or about the 30th day of April, 1915, and until stopped by the injunction and order of this Court, began to dredge and deepen said canal to a depth of eight (8) feet below ordinary low tide, but that said dredging and excavating has been done en-

tirely within the natural banks of said channel with the exception of a short distance where said channel has been widened for a distance of from ten (10) to thirteen (13) feet; that none of the dredging or excavating done as aforesaid was within the boundaries of any land claimed, owned or possessed by plaintiffs, and in this behalf intervenor alleges that all dredging and excavating done in said channel up to the time of the service of the restraining order issued out of this court was done wholly within lands claimed and possessed by the Richmond Belt Railway Company, a corporation.

That defendant has not threatened to or is proceeding to or will unless prevented by the order of this Court, proceed to cut, dredge or excavate said or any ditch or canal eighty (80) feet wide and eight (8) feet in depth, or will dredge or excavate any ditch or canal of any width or depth on any land belonging to plaintiffs; and in this behalf your intervenor alleges that the said defendant will not, nor will your intervenor under its contract with the said defendant, cut, dredge and excavate, or cut or dredge or excavate, or cause or permit to be cut, dredged or excavated, any ditch or canal on, in or through any lands owned by plaintiffs, but that all of said work agreed to be done by said defendant for your intervenor under said contract will be done in, upon and through said navigable channel known as and called the south channel of the San Pablo Canal. That the only dirt or soil carried away has been the dirt and soil excavated from the bottom of said channel, which said earth and soil so excavated has [6]

been placed behind bulkheads on lands adjacent to said channel, in accordance with the requirements of the said permit issued by the War Department of the United States for the dredging of said channel.

That defendant is not threatening to or proceeding to carry away from plaintiffs' property any dirt or soil whatsoever; that plaintiffs will not, unless defendant is restrained by the order of court from any acts alleged in said bill, suffer irreparable or any loss or damage; that none or any acts of defendant constitute a continuing or other wilful and malicious, or wilful or malicious trespass upon the or any property of plaintiffs, or wilful or malicious waste; that plaintiff has not suffered any loss and damage, or loss or damage by any acts of defendant; that the amount of loss and damage, or loss or damage, does not amount to, or will not amount to twenty thousand dollars (\$20,000) or any other sum or amount whatsoever. Denies that plaintiff has no plain, speedy or adequate remedy at law.

WHEREFORE, said city of Richmond, intervenor, prays that the temporary injunction heretofore issued in this action be dissolved and that plaintiffs take nothing by their said action, and for such further relief as may be proper in the premises.

D. J. HALL,

Solicitor for Intervenor.

State of California,

County of Contra Costa,—ss.

E. J. Garrard, being first duly sworn, deposes and says: That he is a member of the council of the city of Richmond and mayor of said city of Richmond,

intervenor named in the above-entitled cause. That he has heard read the foregoing bill in intervention and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are [7] therein stated upon his information or belief, and as to those matters that he believes it to be true.

E. J. GARRARD.

Subscribed and sworn to before me this 31st day of May, 1915.

[Seal]

C. A. ODELL,

Notary Public in and for the County of Contra Costa, State of California.

[Endorsed]: Filed June 14, 1915. Walter B. Maling, Clerk. [8]

In the District Court of the United States, for the Northern District of California, Second Division.

IN EQUITY—No. 184.

LUCIO M. MINTZER and MAURICIA T. MINTZER, as Executor and Executrix of the Last Will and Testament of WILLIAM MINTZER, Deceased,

Plaintiffs,

vs.

NORTH AMERICAN DREDGING COMPANY
OF NEVADA (a Corporation),

Defendant,

CITY OF RICHMOND (a Municipal Corporation),
Intervenor.

**Answer of Plaintiffs to Bill in Intervention of the
City of Richmond, a Municipal Corporation, In-
tervenor, and Motion to Dismiss.**

Now come Lucio M. Mintzer and Mauricia T. Mintzer, as executor and executrix of the last will and testament of William Mintzer, deceased, plaintiffs in the above-entitled action, and move the Court to dismiss the Bill of Intervention of the city of Richmond, a municipal corporation, on the ground that said Bill of Intervention is wanting in equity, and on the further ground that it does not disclose any cause of action or cause of intervention in the matter of the action above entitled; and also upon the further ground that it appears from said Bill of Intervention that the said city of Richmond, a municipal corporation, intervenor herein, is a citizen of the same State as the plaintiffs herein, to wit, the State of California. [9]

And now come Lucio M. Mintzer and Mauricia T. Mintzer, as executor and executrix of the last will and testament of William Mintzer, deceased, the above-named plaintiffs, and without waiving their motion to dismiss the Bill of Intervention of the city of Richmond, a municipal corporation, intervenor, for their answer to said Bill of Intervention of said city of Richmond, a municipal corporation, deny that there now exists, or for more than twenty years last past, or at any time or at all, there has existed, wholly within the limits of the said city of Richmond, or otherwise or at all, a certain or any navigable channel which is alleged extends from the San

Pablo Bay in a northerly direction for a distance of about five thousand (5,000) feet, or any distance whatsoever or at all, or that said alleged channel is a natural or any arm of said San Pablo Bay, or at all, or that said alleged channel is, or during all the times in the Bill of Intervention mentioned has been, of an average width of about one hundred (100) or any feet, or at all, or that the depth of water in said alleged channel or at ordinary low tide said alleged channel has a minimum depth of two (2) or any feet, or at ordinary high tide has a minimum depth of eight (8) or any feet, or that said alleged channel, or which is known or designated as the South Channel of the San Pablo Canal, has been for many or any years last past navigated from San Pablo Bay to its northern extremity by vessels both sail or steam or otherwise or at all, or has been during said time or at all used for the purpose of conveying rock or gravel or merchandise of various or any kinds from other ports or places to the city of Richmond, or at all, or that in order to improve the [10] navigability of said channel or to render it more suitable for the purposes of navigation or commerce, it became or is necessary to deepen said channel throughout its entire length or to a width of eighty (80) feet or to a depth of eight (8) feet at ordinary low tide or otherwise or at all.

Deny that it is essential for the best interests of the city of Richmond, or its inhabitants, or the public generally, that the navigability of said channel be improved or increased, or thereby afforded better transportation facilities for the city of Richmond,

or its inhabitants or the public generally.

And in this connection plaintiffs allege that the only corporation or person in the city of Richmond, or elsewhere, that would derive any benefit from the said alleged deepening of the said alleged channel in any way would be the Standard Oil Company of California, a corporation organized and existing under and by virtue of the laws of the State of California, and having its refining plant in said city of Richmond south of said alleged channel alleged to be called the South Channel of San Pablo Canal.

Plaintiffs state that they have no information or belief sufficient to enable them to answer, and placing their denial upon said ground, plaintiffs deny that on the 2d day of July, 1914, or at any time or at all, the city of Richmond upon due or proper application therefor received from the War Department of the United States permission to improve the navigability of said alleged channel by deepening the same as aforesaid, or that after proceedings duly or regularly had or taken, or otherwise or at all, or after due or proper notice by publication calling for bids for [11] the deepening of said alleged channel or otherwise or at all, a contract for the improvement of said alleged channel was duly or at all let by the city of Richmond to North American Dredging Company of Nevada, a corporation, defendant herein, or that said alleged contract is now, or ever since said last-mentioned date has been, in full or any force or effect, or otherwise or at all.

These plaintiffs deny that if the relief asked for by plaintiffs in their amended bill filed in the above-

entitled action is granted, the intervenor will be greatly or at all injured or damaged, or that it will be unduly or at all limited in its transportation or commercial facilities, or that its inhabitants or the public generally will be deprived of a safe and convenient means of transporting freight or passengers between the city of Richmond or adjacent or other ports or places, or otherwise or at all, or that for all or any of the reasons above stated, the interests of the city of Richmond in the subject matter embraced in the said Amended Bill in the above-entitled action will suffer great or any loss or injury if it is not permitted to become a party to said action by its Bill of Intervention, or otherwise or at all.

And in this connection plaintiffs allege that they are informed and believe, and therefore according to and upon their said information and belief state, that the intervenor herein, city of Richmond, a municipal corporation, and the Standard Oil Company of California, a corporation organized and existing under and by virtue of the laws of the State of California, on or about the 6th day of April, 1915, entered into an agreement whereby it was agreed that the [12] city of Richmond should cause the dirt or soil dredged or taken from the property of plaintiffs to be deposited upon the property of the Standard Oil Company of California, and that it should pay to the city of Richmond ten and 74/100 cents per cubic yard therefor, that being the exact price that the city of Richmond agreed to pay the defendant herein, North American Dredging Company of Nevada for dredging said alleged channel as aforesaid, and that the aim

and puruouse of said agreement between the Standard Oil Company and the city of Richmond was that the Standard Oil Company should pay for said dredging, and thereby receive and obtain the property of plaintiffs without paying them therefor.

That if said alleged channel is deepened in accordance with the agreement between the city of Richmond and the North American Dredging Company of Nevada, a corporation, defendant herein, it will enable the Standard Oil Company of California to obtain a water-way to the San Pablo Bay over and across and upon the land and property of plaintiffs.

That plaintiffs are informed and believe, and therefore upon and according to their said information and belief state, that it is the intention of the city of Richmond, a municipal corporation, intervenor herein, to use the alleged channel after deepening the same as an open sewer through the land and property of the plaintiffs to the San Pablo Bay, and to deposit the sewage from the city of Richmond in the said alleged channel as aforesaid, thereby constituting a public nuisance. [13]

WHEREFORE, the said plaintiffs ask that the prayer of the intervenor be denied, and for such other and further relief as may be meet and proper in the premises.

J. K. JOHNSON,
Solicitor for Plaintiffs. [14]

State of California,
City and County of San Francisco,—ss.

Lucio M. Mintzer, being duly sworn, deposes and says:

That he is one of the plaintiffs in the above-entitled action; that he has read Answer to the Bill in Intervention of the city of Richmond, a municipal corporation, and knows the contents thereof; that the same is true of his own knowledge; except as to matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

LUCIO M. MINTZER.

Subscribed and sworn to before me this 1st day of July, 1915.

[Seal]

HENRIETTA HARPER,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 1, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

IN EQUITY—No. 184.

LUCIO M. MINTZER and MAURICIA T. MINTZER, as Executor and Executrix of the Last Will and Testament of WILLIAM MINTZER, Deceased,

Plaintiffs,

vs.

NORTH AMERICAN DREDGING COMPANY
OF NEVADA, (a Corporation),
Defendant.

CITY OF RICHMOND (a Municipal Corporation),
Intervenor.

Amended Bill for Injunction and Accounting.

To the Honorable, the Judges of the District Court
of the United States, in and for the Northern
District of California:

Lucio M. Mintzer and Mauricia T. Mintzer, citizens of the State of California, residing at the city and county of San Francisco, executor and executrix of the last will and testament of William Mintzer, deceased, lately a citizen of the State of California, residing in the city and county of San Francisco, by leave of Court first had and obtained bring this their amended bill against North American Dredging Company of Nevada, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and having its principal office at Carson City, in the State of Nevada, and an inhabitant of the District of Nevada, and allege and say:

Second. That this suit is between citizens of different States, viz.: the plaintiffs, Lucio M. Mintzer and Mauricia T. Mintzer, citizens of the State of California as executor and executrix aforesaid, and the defendant, North American Dredging Company of Nevada, a corporation, a citizen of the State of Nevada; and that the amount in controversy herein exceeds the sum or value of three thousand dollars (\$3,000), exclusive of [16] interest and costs. The actual damages claimed by plaintiffs against defendant are twenty thousand dollars (\$20,000), and they also ask exemplary or punitive damages for wilful and malicious trespass and waste.

Third. The defendant, North American Dredg-

ing Company of Nevada, is, and at all the times herein named was, a corporation organized and existing under and by virtue of the laws of the State of Nevada.

Fourth. That William Mintzer, deceased, died testate at the city and county of San Francisco, on or about the 10th day of November, 1911. That he was a resident of the city and county of San Francisco, State of California, at the time of his decease. That after proceedings thereunto regularly had, his last will and testament was duly and regularly admitted to probate by the Superior Court of the city and county of San Francisco on the 28th day of November, 1911, and the plaintiffs, named therein were appointed executor and executrix thereof; that plaintiffs qualified as such executor and executrix, and letters testamentary were issued to them on said 28th day of November, 1911. That these letters have never been revoked, and ever since the said 28th day of November, 1911, plaintiffs have been and now are the duly appointed, qualified and acting executor and executrix of the last will and testament of William Mintzer, deceased.

Fifth. That William Mintzer at the time of his decease was seized and possessed, and entitled to the seisin and possession, and ever since the 28th day of November, 1911, the said plaintiffs, as the executor and executrix of the last will and testament of William Mintzer, deceased, have been and now are possessed, and entitled to the possession, of all that certain land and real property situated in the county of Contra Costa, State of California, and described as

being a portion of Survey No. 190, Swamp and Overflowed Lands in S. $\frac{1}{2}$ Sections 10 and 11, [17] W. $\frac{1}{2}$ Section 14, N. $\frac{1}{2}$ S. W. $\frac{1}{4}$ Section 14, and E. $\frac{1}{2}$ Section 15, all in Township 1 N., R. 5 W., Mount Diablo Base and Meridian, and containing 342.10 acres more or less.

Also all of the salt marsh and tide land which lies upon the westerly side of a certain slough or tide creek known as "Peter Davis Creek" situated in Contra Costa County and which is embraced in Survey No. 5 of Contra Costa County for State salt marsh and tide lands. Said lands being more particularly described as follows, to wit:

The fractional S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Section 2, and the West $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of Section Eleven (11) in Township 1 North, Range 5 West, Mount Diablo Meridian.

Also Surveys No. 6 and 7 State Tide Lands, Contra Costa County, Township No. 1 North, Range No. 5 West, Mount Diablo Meridian; Section No. 3; and 10 being the fractional S. E. $\frac{1}{4}$, fractional S. W. $\frac{1}{4}$ of Section 3 and fractional N. E. $\frac{1}{4}$ and fractional N. W. $\frac{1}{4}$ of Section 10, more particularly described in field-notes of said survey as follows: All the tide land lying between the U. S. meander-line and the shore of San Pablo Bay in the southwest quarter of Section Three and in the northwest quarter of Section Ten, Township One North, Range Five West, Mount Diablo Meridian, containing Thirty-eight $\frac{2}{100}$ acres; and all the tide land lying between the U. S. meander-line and San Pablo Bay and Slough in the southeast quarter of Section Three, and in the north-

east quarter of Section Ten, Township One North, Range Five West, Mount Diablo Meridian, containing one hundred and eighty-seven $71/100$ acres, and containing in both surveys two hundred and twenty-five $72/100$ acres, being more fully described in tide land surveys 6 and 7, Contra Costa County.

Sixth. That in or about the month of April, 1915, defendant without right and against the objections of plaintiffs placed [18] poles on said property, and strung high-power electric wires thereon, and brought a dredger in and upon said property, and without right and against the objections of plaintiffs have begun to cut, dredge and excavate a ditch or canal eighty feet wide and eight feet in depth below low tide, and have carried away from plaintiffs' property the dirt or soil from said ditch or canal so cut, dredged and excavated, and threaten to, and are proceeding to, and unless prevented by the order of Court, will proceed to cut, dredge and excavate said ditch or canal eighty feet wide and eight feet in depth below low tide for a distance of between four thousand and five thousand feet in length across the said property of plaintiffs, and to carry away from plaintiffs' property the dirt or soil so cut, dredged and excavated, and unless defendant is restrained by the order of Court from said acts, the plaintiffs will suffer irreparable loss and damage by the said acts of defendant. That said acts of defendant constitute a continuing wilful and malicious trespass upon the property of plaintiffs, and wilful and malicious waste of a portion thereof.

Seventh. That plaintiffs have suffered loss and

damage by the said acts of defendant, and the amount of said loss and damage suffered by the acts of defendant amounts to, and will amount to, the sum of twenty thousand dollars. (\$20,000).

Eighth. That plaintiffs have no plain, speedy and adequate remedy at law.

WHEREFORE, plaintiffs pray for an injunction restraining defendant, its officers, agents, employees and servants, from committing the acts complained of in the plaintiffs' amended bill in cutting, dredging and excavating said ditch or canal and carrying away the dirt and soil from [19] plaintiffs' property, and for a temporary injunction *pendente lite*, and for a restraining order.

For an accounting of the loss and damage suffered by plaintiffs by the acts of defendant.

For such other and further order as may be meet and proper, and for general relief and for costs.

J. K. JOHNSON,
Solicitor for Plaintiffs.

State of California,
City and County of San Francisco,—ss.

Lucio M. Mintzer, being duly sworn, deposes and says: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Amended Bill, and knows the contents thereof; that the same is true of his own knowledge.

LUCIO M. MINTZER,

Subscribed and sworn to before me this 1st day of July, 1915.

[Seal] HENRIETTA HARPER,
Notary Public in and for the City and County of San
Francisco, State of California.

[Endorsed]: Filed Jul. 1, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

*In the District Court of the United States for the
Northern District of California, Second Division.*

IN EQUITY—No. 184.

LUCIO M. MINTZER and MAURICIA T. MINTZER, as Executor and Executrix of the Last Will and Testament of WILLIAM MINTZER, Deceased,

Plaintiffs,

vs.

NORTH AMERICAN DREDGING COMPANY
OF NEVADA, (a Corporation),

Defendant,

CITY OF RICHMOND (a Municipal Corporation),
Intervenor.

**Answer of North American Dredging Company of
Nevada (a Corporation) to Amended Bill.**

Now comes the North American Dredging Company of Nevada, a corporation, the defendant in the above-entitled action, and answering the Amended Bill for Injunction of plaintiffs on file herein, denies:

First. That said William Mintzer at the time of his decease, or ever or at all, was seized or possessed or entitled to the seisin or possession of the land described in said Amended Bill, or any part or portion of said land; and said defendant denies that ever since the 28th day of November, 1911, or any other

date, or ever or at all, said plaintiffs or either of them, either as the executor or executrix of the last will and testament of William Mintzer, deceased, or individually or otherwise, have been, or ever were, or now are possessed or entitled to the possession of the land described in said Amended Bill, or any part or portion of said land, or any interest therein.

And in this connection said defendant alleges that at all times herein mentioned, and for a long time prior thereto, there has existed and now exists over and through a portion of the real property described in said Amended Bill, a certain channel and water-way known and designated as the south channel of the San [21] Pablo Canal, all within the city limits of the city of Richmond, county of Contra Costa, State of California, and that said channel is and has been for many years last past, a navigable water-way, with a public terminus, connecting the said city of Richmond with the San Pablo Bay and the bay of San Francisco; and that at all times herein mentioned, and for many years last past said canal has been and is now a navigable water-way, and that for many years last past vessels engaged in commerce have navigated and traversed said channel; and said defendant alleges that at no time mentioned herein, or in said Amended Bill mentioned, did the plaintiffs or their testator, or either or any of them, ever have title to the land covered by the waters of said channel; and that on or about the 15th day of March, 1915, the said defendant duly entered into a contract in writing with said city of Richmond, a copy of which said contract is hereto attached, marked Exhibit "A," and is hereby referred to and

made a part hereof for all intents and purposes, the same as if set forth herein at length. That by the terms of said agreement in writing the said defendant agreed to dredge a channel eighty (80) feet wide, in and through said south channel of said San Pablo Canal, to a uniform depth of eight (8) feet below low tide, and that said work of dredging said channel under and in accordance with the terms of said contract, was commenced by said defendant on or about the 21st day of April, 1915, for the purpose of improving said water-way in the interest of commerce and navigation, by deepening the bed of said channel without altering or changing the banks or course of said channel, which channel has a public terminus, so that the navigability of said channel will be improved, and so that said channel will be navigable at all times for vessels engaged in commerce, of deeper draft than vessels which can now navigate said channel.

Second. Said defendant denies that in the month of April, [22] 1915, or at any other time, or ever or at all, said defendant, without right or against the objections of plaintiffs, or either of them, placed poles on any property of plaintiffs, or either of them, or strung high-power electric wires or any wires on any property of plaintiffs, or either of them.

Third. Said defendant denies that in the month of April, 1915, or ever or at all, said defendant brought a dredger in or upon the property described in the Amended Bill, or any part or portion thereof, except as hereinafter stated; and said defendant denies that said defendant, without right or against

the objections of plaintiffs, or either of them, began to cut or dredge or excavate a ditch or canal eighty (80) feet wide or eight (8) feet in depth, below low tide, except as hereinafter stated; and said defendant denies that said defendant has carried away from plaintiffs' property any dirt or soil; and said defendant denies that said defendant threatens to or will or is proceeding to or will, unless prevented by the order of the Court, proceed to cut or dredge or excavate said or any ditch, or canal, eighty (80) feet wide or eight (8) feet deep, or of any other dimensions, for a distance of between four and five thousand feet across said or any property of plaintiffs, except as hereinafter stated; and said defendant denies that said defendant will carry away from any of plaintiffs' property any dirt or soil cut or dredged or excavated, except as hereinafter stated; and said defendant further denies that plaintiffs or either of them have suffered any irreparable or any loss or damage by any acts of defendant; and said defendant denies that it has committed any wilful or malicious or any trespass upon any property of plaintiffs, or either of them, or any wilful or malicious waste of any portion or any of plaintiffs' property, or of any property of either of plaintiffs; and said defendant denies that it will, unless restrained [23] by order of Court, do or perform any act or thing which will cause plaintiffs, or either of them, to suffer any irreparable or any other loss or damage; and said defendant denies that it will, unless restrained by order of the Court, perform any acts, constituting a continuing wilful or malicious or any other

trespass upon any property of plaintiffs or either of them; and said defendant denies that it will, unless restrained by order of this Court, do or perform any acts or act which will constitute a wilful or malicious or any other waste of any portion of any property of plaintiffs or either of them.

And in this connection said defendant alleges and avers that on or about the 21st day of April, 1915, pursuant to a notice from the city engineer of the city of Richmond, and in accordance with the terms and provisions of the aforesaid contract, the said defendant in performance of the work under the aforesaid contract, with a ten horse-power gasoline launch, drawing about five (5) feet of water, towed up the south channel of the San Pablo Canal from the Bay of San Francisco and the San Pablo Bay, and to the extreme southerly end of said channel, in the city of Richmond, a hydraulic suction dredge called the Wilmington, drawing about four (4) feet of water, and having a hull twenty-eight (28) feet wide by seventy-four (74) feet in length, and equipped with a fifteen (15) inch suction pump and a six hundred and fifty (650) horse-power motor. That said channel runs through a portion of the lands described in the Amended Bill, and is a navigable water-way having a public terminus, and connecting the city of Richmond with San Pablo Bay, and the bay of San Francisco; and that said channel and water-way has been for many years last past, and is now navigated by vessels engaged in commerce. That the work heretofore performed and to be performed by defendant, is the improving of said water-way by deepening the

bed of said channel without altering or changing the banks [24] or course of said channel, except in one place where one of the banks of said channel was cut for a distance of ten to thirteen feet, so that the navigability of the same will be improved, and so that said channel will at all times be navigable for vessels engaged in commerce, and drawing more water than the vessels which can now navigate said channel; and that on or about the 30th day of April, 1915, said defendant commenced to operate said dredge, and to dredge earth and material from the bed of said channel to a depth of nine (9) feet below mean low water, and to discharge earth and material from the bed of said channel behind suitable bulk-head upon the lands immediately south of the southerly end of said channel.

Fourth. Said defendant denies that plaintiffs, or either of them, have suffered any loss or damage whatsoever by any acts of said defendant, or that plaintiffs, or either of them, will suffer any loss or damage whatsoever by any contemplated acts or act of defendant; and said defendant denies that the amount of any loss or damage alleged to have been suffered, or suffered by any acts or act of defendant will be or will amount to the sum of twenty thousand (20,000) dollars, or any other sum or amount whatsoever.

Fifth. Said defendant alleges that plaintiffs and each of them have a plain, speedy and adequate remedy at law if any right or rights of plaintiffs, or either of them, have been interfered with; and said defendant denies that unless restrained or en-

joined by the process of this Court, any damage will be committed or that any act or acts of defendant have caused or will cause plaintiffs, or either of them, any irreparable or any loss or injury, or that plaintiffs, or either of them, will suffer irreparable or any loss or injury by any contemplated acts of defendant, or by any acts or act of defendant.

Sixth. And further answering said Amended Bill, defendant alleges that while proceeding with said work of dredging from [25] the bed of said channel in said water-way, and after it had been dredging from said channel for sixteen (16) days, and after it had dredged therefrom approximately twenty-two thousand (22,000) cubic yards of material, pursuant to the aforesaid contract, the said defendant was served on May 15, 1915, with a temporary restraining order issued out of this court, commanding said defendant to stop work on said improvement, and that said defendant, pursuant to said order, stopped work on said improvement on May 15, 1915, and has ever since discontinued work under said contract. That said defendant has suffered damage thereby at the rate of two hundred and fifty (250) dollars per day from the 15th day of May, 1915, to the date of the filing of this answer, and will continue to suffer damage thereby at the rate of two hundred and fifty (250) dollars per day from the date of the filing of this answer to the date of the hearing of this cause. That at the time said restraining order was served, as aforesaid, defendant was operating in said channel the aforesaid hydraulic suction dredge, which dredge was capable

of dredging four thousand (4000) cubic yards of material from said channel daily, and that said dredge has an earning capacity of four hundred and thirty (430) dollars per day. That by reason of the temporary restraining order, order to show cause, and temporary injunction issued herein, said defendant has suffered, and is sustaining loss and damage to the extent of two hundred and fifty (250) dollars or thereabouts per day.

WHEREFORE, defendant prays that said temporary injunction *pendente lite* be dissolved and that plaintiffs be denied any relief, and that defendant have judgment against plaintiffs for all loss and damage suffered and sustained by it by reason of said temporary restraining order, order to show cause, and temporary injunction *pendente lite*, issued herein, and for costs of suit and for such other and further relief as may be meet and proper in the premises. [26]

NORTH AMERICAN DREDGING COM-
PANY OF NEVADA,

[Seal]

By W. L. PAULSON,
Secretary,

Defendant.

EARL D. WHITE,
Solicitor for Defendant.

State of California,
County of Alameda,—ss.

W. L. Paulson, being duly sworn, deposes and says: That he is an officer, to wit, the secretary of North American Dredging Company of Nevada (a corporation), the defendant named in the above-entitled ac-

tion; that he has heard read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and that as to those matters he believes it to be true.

W. L. PAULSON.

Subscribed and sworn to before me this 12th day of July, 1915.

[Seal]

ELEANOR RUSSELL,

Notary Public in and for the County of Alameda,
State of California.

I hereby certify that the foregoing answer is, in my opinion, well founded in point of law.

Dated July 12th, 1915.

EARL D. WHITE,

Solicitor for Defendant. [27]

**Contract, March 15, 1915, Between City of Richmond,
etc., and North American Dredging Company.**

CONTRACT.

Richmond, Contra Costa County,
California.

**CONTRACT AND SPECIFICATIONS FOR THE
DREDGING OF THE SOUTH CHANNEL OF
SAN PABLO CANAL, FROM THE NORTH-
ERLY LINE OF THE PROPERTY OF THE
STANDARD OIL COMPANY TO SAN PABLO
CANAL, IN THE CITY OF RICHMOND,
COUNTY OF CONTRA COSTA, STATE OF
CALIFORNIA, AND ALL AS DESCRIBED**

AND SHOWN IN AND UPON THE CONTRACT, SPECIFICATIONS AND PLANS FOR THE WORK ON FILE IN THE OFFICE OF THE CLERK OF THE CITY OF RICHMOND, AND WHICH ARE MADE A PART HEREOF.

This Contract, made and entered into this 15th day of March, A. D. 1915, by and between the CITY OF RICHMOND, a municipal corporation, body corporate and politic, in the County of Contra Costa, State of California, acting in its representative capacity by and through the Council of the City of Richmond, who are duly authorized, the party of the first part, hereinafter designated as the "City," and NORTH AMERICAN DREDGING CO., a corporation, the party of the second part, hereinafter designated as the "Contractor."

The word "Engineer" to mean H. D. Chapman, the Engineer employed by the City of Richmond to plan, supervise and have charge of the work herein specified, or his duly authorized representative or any deputy or assistant who shall be appointed by and under the authority of the said Engineer with the approval of the party of the first part.

The word "Contract" to mean and include this Contract and the Bond, Specifications and Plans herein contained, annexed or referred to herein. Said Plans being entitled "Plan for the Improvement of South Channel of San Pablo Canal," dated February 8, 1915, and said Specifications being entitled "Specifications for the Dredging of the South Channel of the San Pablo Canal, from the Property

of the Standard Oil Company to the San Pablo [28] Canal, in the City of Richmond, County of Contra Costa, State of California," dated February 8, 1915.

WHEREAS, said H. D. Chapman, in accordance with an order of said Council of the City of Richmond, has heretofore prepared and filed Plans and Specifications, Maps and Drawings, for the work hereinafter specified; and

WHEREAS, said City Council of said City of Richmond by order duly passed and adopted and entered on the minutes of said Council has heretofore regularly and duly approved and accepted the said plans and specifications hereinbefore referred to, and said City Council has ordered and directed that the said work herein provided for be done and the material and labor and things necessary therefor be furnished, happened and done, all in accordance with the plans, specifications and contract, and that bids be advertised for in accordance with law for the performance of the work and the furnishing of the labor and materials specified; and

WHEREAS, bids for the doing of said work and the furnishing of the necessary materials and labor therefor in accordance with said plans and specifications, have been regularly advertised; and

WHEREAS, the party of the second part has presented a bid and proposal for furnishing all of the material and labor and for the doing of said work, and said Council being duly advised in the premises, did, by resolution and order duly and regularly made and entered in its minutes, accept said bid and proposal of said party of the second part, herein termed

the Contractor, and did award to said Contractor the contract for furnishing said labor and material and the doing of said work, and did provide for the execution and delivery of this contract; and

WHEREAS, the plans and specifications for the doing of said work and the furnishing of the necessary material and labor therefor are herein incorporated, attached and annexed hereto [29] and are expressly referred to and made a part of this contract;

NOW, THEREFORE, in consideration of the premises herein and for the further consideration of the sum hereinafter mentioned, to be paid by the party of the first part to the party of the second part, herein termed the Contractor, as hereinafter expressed and provided for, the Contractor for himself, his successors and his assigns, does hereby promise, covenant and agree with the City that he will honestly and faithfully do and perform all of the work heretofore referred to and will furnish all material and labor necessary therefor, and will do and furnish all acts and things necessary to be furnished, happened and done, in strict accordance with the terms of the notice to bidders, contract, specifications, plans and contractor's proposal and bonds therefor, hereinbefore referred to and annexed hereto, and in strict accordance with all of the terms hereof, within the time hereinafter expressed; and upon the completion of said work as provided for by the terms of this contract, the Contractor will deliver said work herein provided for to the City or its authorized agents.

In consideration of the premises, covenants and agreements on the part of the Contractor herein contained, and for and in consideration of the performance of the work herein provided for, and for the furnishing of all material and labor necessary therefor, and of the acts and things necessary to be furnished, happened and done by the Contractor, the City hereby promises, covenants and agrees to pay, and cause to be paid, to the Contractor at the times and in the manner hereinafter specified, the sum of \$.1074 per cubic yard of material actually excavated, measured in place, and deposited through a pipe-line at such places as may be directed by the City Engineer, within a distance of 4000 feet from the point of dredging; and it is understood and agreed that the City of Richmond shall furnish or obtain a right [30] of way for conducting said pipe-line from the channel of said canal to the place of deposit and provide all rights necessary for depositing the material at places where directed by said City Engineer and assume all liability as may arise, if any, on account of so depositing the material at points and places as directed.

The price to be paid to the Contractor hereunder is in no case to exceed the sum of Ten thousand two hundred and no/100 dollars (\$10,200.00), for the doing and performing of said work, for the furnishing of material and labor necessary therefor, and for all acts, and things necessary to be furnished, happened and done. The payments to be made under this contract by the City are to be as hereinafter set forth.

It is understood that the Contractor is skilled in the trade or calling necessary to perform the work herein agreed to be done under this contract, and that the City not being skilled in such matters, relies upon the skill of the Contractor to do and perform all the work and labor necessary, and all the acts and things necessary to be furnished, happened and done, in the most skilled and durable manner, and the Contractor guarantees the workmanship and character of materials to be the best of their kind, and the acceptance of any part of the work, or the whole of the work, does not operate as a release to the Contractor or his bondsmen from said guarantee.

The Contractor agrees that if the work to be done under this contract shall be abandoned by him, or if this contract shall be assigned by him without the written consent of the City, or if at any time the said Engineer shall be of the opinion, and shall so certify in writing to the City, that the work, or any part thereof, is unnecessarily or unreasonably delayed by said Contractor, or that the Contractor is willfully violating any of the conditions or covenants of this contract and specifications, of the plans, or of any other papers to this contract, or is executing [31] the work under this contract in bad faith, the City shall have the power to notify said Contractor to discontinue the work, or any part thereof, under this contract; and thereupon the Contractor shall cease to continue such work or such part thereof as the City may designate.

And the said City shall thereupon have the power

to place such or so many persons and to hire such implements, machinery, equipment, tools, materials or material and labor as the Engineer may deem necessary to work at and to be used to complete the work herein described, or such part thereof as the Engineer may deem necessary; and to use such material as may be found upon the line of said work and to procure other material for the completion of the same and to charge the expense of such labor, material, implements, equipment, tools, etc., to the Contractor, and the expense so charged shall be deducted and paid by the City out of such money as may be due, or may at any time thereafter become due to the Contractor under and by virtue of this contract, or any portion thereof.

In case such expense is less than the sum which would have been payable under this contract if the same had been completed by the Contractor, then the Contractor shall be entitled to receive the difference, but in case such expense shall exceed the last said amount, then the Contractor or his bondsmen shall pay the amount of such excess to the City on notice by the City of the amount of excess so due.

Eight hours' labor shall constitute a day's work for any one calendar day for all work and labor to be performed under and in accordance with the terms and conditions of this contract, and two dollars and fifty cents (\$2.50) shall be the minimum compensation to be paid for labor upon all of said work.

Any laborer, workman, or mechanic employed at any time by the Contractor, or by any sub-contractor under him upon the work, [32] or any part there-

of, shall not be required or permitted, to work there-upon more than eight hours in any one calendar day, except in cases of extreme emergency by fire, flood, or danger to life or property, and the Contractor hereby agrees to forfeit as a penalty to the City under the terms of this contract, the sum of Ten Dollars for each laborer, workman, or mechanic, employed in the execution of said contract by the Contractor, for each and every calendar day during which said mechanic, workman or laborer is required or permitted to labor more than eight hours in violation of the terms of said stipulation, and the City is hereby authorized and directed through its proper representatives to withhold and retain from the Contractor, or from the said sub-contractor under him, all sums and amounts which shall have been forfeited pursuant to said stipulation, as the property of the City, as provided for by an act of the Legislature of the State of California, entitled "An Act Limiting the Hours of Service of Laborers, Workmen or Mechanics Employed Upon Public Works, of, or Work Done for the State of California, or on or for any Political Subdivision Thereof; Imposing Penalties for the Violation of the Provisions of said Act, and Providing for the Enforcement Thereof," etc., Approved March tenth, nineteen hundred three, and all acts amendatory thereto.

It is hereby further agreed that the Contractor shall and will, well and sufficiently, furnish a hydraulic dredge, the hull being 80 feet in length and 34 feet in width, and being fitted with a suction pump

of 15 feet in diameter, with all its appurtenances, supplies, superintendent and crew, together with her tackle, pipes, etc., for the purpose of performing the herein specified dredging work, and pay for all labor, fuel, oil and supplies incident to said dredge work, and keep said dredge and all its appurtenances in repair during the progress of the work. And the Contractor shall, under the direction and to the satisfaction [33] of the engineers do all of the dredge work included in and necessary for the dredging of the herein specified channels, subject to the provisions contained in this contract, and in the plans and specifications hereto attached, and all in accordance with the agreements contained in the permission for dredging work to be done under this contract and specifications given to the city of Richmond by the United States Government, a copy of which is hereto attached and made a part thereof, and the Contractor shall be and he is hereby held to all the provisions, regulations or permissions therein contained.

And it is further agreed that the Contractor shall not remove said suction dredge from the work without the written consent of the city of Richmond, unless said Contractor is delayed from proceeding with the work hereunder for a period of 15 days by some act of God, or by war, revolution, invasion, riots, strikes, injunction, order or direction of any Court or any unforeseen acts not the fault of the Contractor. If said dredge is so removed and within 10 days after such removal said City or Contractor may proceed with the work hereunder, then said Con-

tractor shall proceed with the work hereunder within thirty (30) days after receipt of written notice from the City Engineer pursuant to authorization of the City Council of the city of Richmond.

It is hereby mutually understood and agreed, between the parties hereto, that the Contractor shall begin the herein specified work on or before ninety (90) days after the execution of this agreement, or within ten (10) days after receipt of notice from the City Engineer pursuant to authorization from the City Council of said city, and that work shall be diligently prosecuted to completion within specified time. The Contractor shall maintain an average monthly output such that he will finish within the herein specified time limit, unless prevented by stormy or inclement weather or other act of God, or by war, revolution, invasion, [34] riots, strikes, injunctions, orders or direction of any Court, or any unforeseen acts not the fault of the Contractor.

The loss or destruction of the said dredge or its injury by fire or otherwise, to such an extent that more than thirty (30) days shall be required for its repair shall not terminate this employment, if the Contractor shall, within ten (10) days after such loss, destruction or injury notify the city of Richmond that the work herein mentioned will be continued by such Contractor with another dredge of similar size and capacity, or with another dredge provided that the Engineer shall approve in writing of the substitution of any other dredge of less size and capacity.

In the event that the Contractor shall fail to give

such notice or having given such notice shall fail to provide the substitute dredge or dredges hereinbefore mentioned within twenty (20) days after such loss, destruction or injury upon the site of the work, then this contract shall terminate, and such termination shall not be a breach of this agreement by the Contractor. If said dredge shall be so injured so that it can be repaired and placed in operation on the said work in thirty (30) days or less, the Contractor shall proceed with reasonable diligence to make such repairs and resume work and the consequent cessation from work shall be added to the time limit for the work hereunder and shall not be a breach of this agreement by the Contractor.

The Contractor shall make no claim that he has been delayed in the beginning, prosecution and completion of the said work or any of its branches, unless the cause for such delay shall be distinctly set forth in writing to said Engineer within twenty-four (24) hours of the time such delay is said to have occurred. In the event said work is commenced and the completion thereof is permanently stopped by injunction or other legal process or order, the city of Richmond shall not be liable to the Contractor in any amount in excess of the yardage of material already removed at the time of [35] such suspension or stopping of said work, at the unit price herein set forth, by reason of not being prevented from completing the work.

In the event that the Contractor is prevented from commencing said work by reason of any injunction or legal process or order, the City of Richmond shall not

be liable to the Contractor for any damage he may sustain by reason of his being prevented from commencing or completing the work provided to be done hereunder.

The City will pay, and the Contractor shall receive, in full, compensation for furnishing all necessary materials and labor, and for performing and completing all work which is necessary and proper to be furnished or performed in order to complete the herein specified work, the following prices, to wit: The sum of \$.1074 per cubic yard of material measured in place, payable in gold coin of the United States as follows:

On or before the tenth (10th) day of each calendar month the Engineer shall render or deliver to the Contractor a certificate stating the approximate amount of work performed under this contract during the previous calendar month by said Contractor, and the value of the same. Payments are to be made on the 10th day of each month at the rate of seventy-five (75) per cent of such amount. Final payment of the remaining twenty-five (25) per cent of said price shall be made thirty-five days after this contract is completely finished and accepted by the City of Richmond.

To prevent disputes and litigation, the Engineer shall in all cases determine the amount, quality and acceptability or fitness of the work and materials which are to be paid for under these specifications, and said Engineer shall determine and interpret all plans drawn from time to time for the detailing of the work.

The Engineer shall render a final certificate of quantities and acceptance of work whenever in his judgment such work shall [36] be completed.

Time of completion of said work under this contract shall be within a period of ninety (90) days from and after the commencement of work hereunder and such extensions as are herein provided for and such extensions as may be granted by the City Council of the City of Richmond. The time during which the Contractor is delayed in said work by any act of the Engineer, the City, its agents or employees, by the Acts of God, war, invasion, revolution, riots, injunctions or other prevention, order or direction of any Court, strikes, or by any condition or thing which the Contractor could not reasonably have foreseen and provided for, or by stormy or inclement weather, which delays the work in the judgment of the Engineer, shall be added to the aforesaid time of completion, and said time of completion shall be lengthened to that extent.

The City reserves the right to temporarily suspend the completion of the whole or any part of the work herein contracted to be done if such suspension shall be deemed necessary for the best interests of the City. And if the City Engineer of said city should pursuant to authorization of the City Council, notify said Contractor to temporarily suspend the completion of said work, said Contractor shall thereupon cease work under said contract until notified by said City Engineer to proceed, with said work and if said Contractor should be thus hindered or delayed in the performance of the work hereunder, said City of Richmond

shall pay to said Contractor for each and every day said Contractor is so delayed, at a rate equal to the average earning power of said dredge so delayed, as computed upon the actual performance of said dredge, so delayed under this Contract, and such delays shall not be charged against the Contractor's time limit hereunder.

The acceptance by the Contractor of the last payment for the work, if accepted without previous notice to said City of its claims against said City, shall be and shall operate as a release [37] to the City from all claim and liability to the Contractor for anything done or furnished for or relating to the work, or for any act of neglect of the City or its agents in any way affecting the work, excepting the claim against the City for the remainder kept or retained after the completion of the Contract as provided for in this Contract.

Upon written notice by the Contractor to the Engineer of the completion of said work hereunder provided for, the Engineer shall proceed without delay to examine the same and if found to be in accordance with the Contract, shall accept said work and shall notify the Contractor, or his agent, of such acceptance or nonacceptance, and if the latter, of his reason for such nonacceptance.

If there be any injunction, strike or interference of authorities which shall or will, in the opinion of the Engineer, delay the work, the Contractor shall give the City notice of such injunction or other cause of delay, together with all details, papers, copies or injunc-

tions or other things appertaining to such injunction or other cause of delay.

The City shall have the right to intervene or become a party to any suit or proceeding in which any injunction shall be obtained or prayed for, and to move to dissolve the same or otherwise as the City may deem proper.

The City shall have the right to have its own Counsel appear in any injunction suit or other suits which in the opinion of the City may delay the work and agrees to defend the City, its officials and the Contractor in any and all actions or proceedings in any Court, arising out of the execution of this contract or the performance of the work hereunder in accordance with the terms hereof.

If the contractor shall at any time claim compensation for any damage sustained by reason of the acts of the City, its agents, or in any manner arising out of or in connection with this contract [38] or the work thereunder, he shall, within ten days after the sustaining of such damage, make a written statement to the Engineer of the nature of the damage sustained or claimed, together with an itemized statement of the details, the amount of the damage, the Contractor's reason for claiming compensation therefor from the City, and such other explanations or details as may be required by the Engineer, and unless such statement be as thus required no claim for compensation shall lie against the City nor shall be heard or considered by the City.

On all work, until the termination of this contract,

the Contractor is to assume all liabilities of any kind or nature arising from said work, either from accident or negligence of said Contractor or its agents, or servants, excepting earthquakes, and tidal waves.

Should the Contractor sublet, relet, or assign any portion or all of the contract hereunder provided for, said Contractor and his bondsmen shall be held responsible, accountable, and answerable for all things, acts, conditions, work to be performed, materials to be furnished and all other things provided for in the contract, done, performed or happened by said subcontractor.

The Contractor shall punctually pay his employees, who shall be engaged upon the work covered by this contract, and shall pay such employees in cash, currency, or negotiable bank checks on a solvent bank, and he shall not pay such employees in store money orders, nor shall *be* carry on or conduct a company store.

All persons employed on said work shall be paid not less frequently than the 1st and 15th days of each and every month during the term of such employment.

The contractor shall not be interested either directly or indirectly in any employment agency or employment bureau, nor shall the Contractor receive or retain in whole or in part any fee or [39] charge made by any employment agent, employment agency or employment bureau for securing employment for any person on said work, nor shall the Contractor collect or retain out of the wages of any person employed on said work any fee charged by any employment agent, employment agency or employment bureau to

any person securing employment upon said work.

The Contractor will not collect or charge or retain out of the wages of any person employed on said work any hospital or medical charge or fee; nor shall the Contractor require any person employed upon said work to pay any medical, surgical or hospital fee or charge except where medical, surgical or hospital services have been actually supplied to such person.

Any violation of the above conditions of said Contract shall render the Contractor liable to a penalty of \$10.00 for each and every violation of any of the above conditions; such penalty to be deducted from the amount to be paid to the Contractor hereunder.

Time is the essence of this Contract.

IN WITNESS WHEREOF, the said party of the first part, the City, acting in its representative capacity by and through its City Council, has caused these presents to be duly subscribed and signed, and its corporate name and seal to be affixed hereto, and the Mayor of the City of Richmond who is duly authorized thereto, sets his hand and the Clerk of said City Council of the City of Richmond affixed the seal of said City as and for the good of the said party of the first part, and affixes his signature thereto, and the said party of the second part, the Contractor, has caused these presents to be subscribed and its corpo-

rate name and seal to be affixed by its Secretary thereunto duly authorized.

CITY OF RICHMOND.

By E. J. GARRARD,

As Mayor of the City of Richmond [40] and Presiding Officer of the City Council of the City of Richmond, Contra Costa County, State of California.

NORTH AMERICAN DREDGING CO. OF
NEVADA.

Contractor.

By W. L. PAULSON,

Secretary.

Attest: A. C. FARRIS,

City Clerk and Clerk of the Council of the City of Richmond.

State of California,
County of Contra Costa,
City of Richmond,—ss.

On this 16th day of March, 1915, before me, W. Lindsey, a notary public in and for the County of Contra Costa, State of California, personally appeared E. J. Garrard and A. C. Farris, known to me to be the Mayor of the City of Richmond and the Clerk of the City of Richmond, respectively, and known to me to be the persons whose names are subscribed to the annexed instrument as such Mayor and Clerk, respectively, and they each acknowledged to me that they executed the within instrument as such Mayor and Clerk, respectively.

IN WITNESS WHEREOF, I have hereunto set

my hand and official seal, the day and year in this certificate first above written.

[Seal] WILLIAM LINDSEY,
Notary Public in and for the County of Contra Costa,
State of California. [41]

SPECIFICATIONS

FOR THE DREDGING OF THE SOUTH CHANNEL OF THE SAN PABLO CANAL, FROM THE PROPERTY OF THE STANDARD OIL COMPANY TO THE SAN PABLO CANAL, IN THE CITY OF RICHMOND, COUNTY OF CONTRA COSTA, STATE OF CALIFORNIA.

LOCATION.

The proposed channel extends northerly from the northerly line of the property of the Standard Oil Company in Lot Seventeen (17), Section 10 T 1 N. R. 5 W., M. D. B. & M., an approximate distance of 4000 feet, and connects with the San Pablo Canal in Lot Thirty-one (31), Section 3, T 1 N. R. 5 W., M. D. B. & M., as shown on Plan entitled "Plan for Improvement of South Channel of San Pablo Canal" dated February 8, 1915.

GENERAL.

The work to be done under these Specifications is the dredging of a channel eighty (80) feet wide on the bottom, having side slopes of one (1) foot horizontally to one (1) foot vertically, the bottom of said channel to be eight (8) feet below low water, or an elevation of -8.0 feet below the base of the City of Richmond, as established by Ordinance No. 42. The de-

positing of the material dredged at such places as may be directed by the Engineer in charge, within a distance of 4000 feet from the point of dredging.

TIME.

The Contractor shall begin work within thirty (30) days after the signing of the contract for the work herein specified, and shall complete the work within a period of ninety (90) days from the date thereof.

SUPERVISION.

All equipment, workmanship, and construction shall be of the best of their several kinds, and fully up to the standard of the best modern construction work, and shall be under the supervision [42] and to the satisfaction of the City Engineer, and hereinafter mentioned as "Engineer." The right is reserved by the City of Richmond, its engineer or agents, to enter upon any part of the work, or any dredges or equipment used thereon, at any time for the purpose of inspection or necessary investigation.

DREDGE.

The Contractor shall and will furnish a hydraulic or suction dredge with all its appurtenances, supplies, superintendent and crew, together with her tackle, apparel, pontoons, pipe, etc., for the purpose of performing the said dredging work and to pay for all labor, fuel, oil and supplies incident to said dredging work, and shall keep said dredge and all of its appurtenances in repair during the progress of the work. The Contractor shall under the direction and to the satisfaction of the City of Richmond, or its agents and engineer, do all of the dredging work in-

cluded in and necessary for the dredging of the certain channel as shown on the accompanying map, and as set forth in these Specifications, subject to the provisions herein contained. All of the work shall be done in strict accordance with these Specifications.

Before the beginning of the work, and during its progress, the engineer shall set stakes 400 feet apart or at sufficient intervals to indicate the line of the channel, and the Contractor shall be required to dredge the material from such points as staked.

Should it appear that the work hereby intended to be done or any of the matters relative thereto are not sufficiently detailed or explained in the said Specifications, the Contractor shall apply to the Engineer for such further drawings or plans or specifications as may be necessary, and shall conform to the same as part of this contract.

During the progress of the above work the direction of the same and the interpretation of the Specifications shall be given only by the Engineer, and followed by the Contractors. [43]

Should any dispute arise, the decision of the Engineer shall be accepted as final by the Contractor.

The Contractor shall and will perform the said work and every part and detail thereof in a prompt and diligent manner, and shall operate the dredge or dredges which are engaged in the work of constructing said channel in the manner herein provided. The Contractor shall make no claim that he has been delayed in the beginning, prosecution or completion of the said work, or any of its branches.

The Contractor shall complete the work as herein specified, and as it would be difficult to ascertain the amount of damage the City of Richmond would sustain by reason of the failure of the Contractor to complete said work within the period herein specified; it is hereby agreed and in the event that the Contractor shall fail to complete said work at the time herein specified, the Contractor shall upon demand pay to the City of Richmond the sum of \$100.00 per day for each day consumed by said Contractor in excess of the period herein provided, said sum to be paid to and retained by the City of Richmond as liquidated damages.

The Contractor shall not let, under-let, assign, or transfer this contract, or any interest therein, without the written consent of the City Council of the City of Richmond.

The Engineer's estimate on the job is 69224 cubic yards of excavation, and the Contractor shall bid a unit price per cubic yard. No allowance on final estimates will be made for depths below an elevation of -9.0 feet, and in no case shall the amount to be paid for this work fully completed, exceed \$10200.00.

PAYMENTS.

Payments for work performed under these Specifications shall be made by the City of Richmond, on or about the 10th day of each month until the entire completion and acceptance of the said work, as follows: On or before the tenth (10th) day of each calendar month the Engineer shall render or deliver to the [44] Contractor a certificate stating the approximate amount of work performed under this Contract

during the previous calendar month by said Contractor, and the value of the same. Payments are to be made on the tenth (10th) day of each month at the rate of seventy-five per cent (75%) of such amount. Final payment of the remaining twenty-five per cent (25%) of said price shall be made thirty-five (35) days after this Contract is completely finished and accepted by the City of Richmond.

The City of Richmond shall not be liable or responsible for any accident, loss or damage happening or accruing to any person or to any property during the time of the performance of the work herein referred to, or in connection therewith by performance under these Specifications or the Contract, and the Contractor agrees to and does hereby, hold the City of Richmond harmless therefrom, and further agrees to reimburse the City of Richmond for any or all loss or damage in any way resulting from any cause whatsoever in connection with the performance of the work provided herein, or any acts of the Contractor, his agents or servants.

The Contractor shall in all instances provide for the use of any or all channels that are now open to navigation, and shall interrupt the same as little as possible, and shall maintain the necessary lights that must be displayed during the progress of the work, and the same shall be maintained in accordance with the rules and regulations established by the Secretary of Commerce, and the Contractor shall first obtain the permission of the Commissioner of Light Houses.

The Contractor shall submit to the City Council of the City of Richmond, the name of the Insurance

Company in which he intends to insure the workmen on the herein specified work, and shall further give sufficient information that the proper insurance has been taken out to cover the work herein contemplated in order to comply with the provisions of the State "Workmen's [45] Compensation Insurance and Safety Act" approved May 26, 1913, so as to secure the City of Richmond from any damage arising under the provisions of the State Law.

The Contractor's bid shall be based on his own knowledge of the ground derived from his own examination of the site of the work and its surroundings and conditions. No allowance will be made for any difficulties which the Contractor may encounter, he having bid with knowledge of all conditions as aforesaid.

The Contractor shall be constantly on the work during its progress or shall be represented by a foreman who is competent to receive and carry out any instructions which may be given him by the proper authorities, and the Contractor shall be held liable for the observance of any instructions of the Engineer which may be delivered to him or his representatives on the work.

PERMISSION FOR DREDGING.

Permission for the above work has been obtained from the War Department of the United States Government, but all of the work herein specified shall be subject to the supervision and approval of the local District Engineer Officer, U. S. Army, whose office is at 401 Custom House, San Francisco, California, and who may temporarily suspend the work at any

time if in his judgment the interests of navigation so require, or for any other reason, and the Contractor shall have no claim for damage against the City of Richmond for any such delay.

The Contractor will keep the City of Richmond free and harmless of any damage resulting from any injury done or performed by the Contractor to private property or the invasion of private rights, or any infringement of any laws or regulations, and these Specifications do hereby provide that the Contractor shall fulfill all such laws and regulations, ordinances, etc., either municipal, state or national, that may apply to the work herein specified.

In the event that said work is temporarily suspended or permanently stopped by injunction or other legal process or order, [46] the City of Richmond shall not be liable to the Contractor in any amount in excess of the yardage of material already removed at the time of such suspension or stopping of said work.

In the event that the Contractor is prevented from commencing said work by reason of any injunction or other legal process or order, the City of Richmond shall not be liable to the Contractor for any damage he may sustain by reason of being prevented from commencing or completing the work provided for herein.

BONDS.

The Contractor or Contractors to whom the contract shall be awarded shall give a bond for the faithful performance of the contract, to be delivered upon the execution of the contract and to be for a sum not

less than one-fourth ($\frac{1}{4}$) of the total estimated amount of the contract as determined from the Contractor's bid.

Said Contractor or Contractors to whom the contract is awarded shall also furnish a good and sufficient bond to secure the payment of claims or materialmen, mechanics or laborers as required by the law of the State of California, in a sum not less than one-half ($\frac{1}{2}$) of the total estimated amount of the contract as determined from the Contractor's bid.

CONTRACT.

Said Contract shall provide that any violation of the above conditions of said contract shall render the Contractor liable and subject to the penalties and conditions as follows: The City shall have the power to notify said Contractor to discontinue the work, or any part thereof, under this contract; and thereupon the Contractor shall cease to continue such work or such part thereof as the City may designate.

And the said City shall thereupon have the power to place such or so many persons and to obtain by contract, purchase, or hire such implements, machinery, equipment, tools, materials, or [47] material and labor, as the Engineer may deem necessary, by contract, or otherwise, as said City may deem it advisable to work at and to be used to complete the work herein described, or such part thereof as the Engineer may deem necessary, and to use such material as may be found upon the line of said work and to procure other material for the completion of the same and to charge the expense of such labor, material, implements, equipment, tools, etc., to the

Contractor, and the expense so charged shall be deducted and paid by the City out of such money as may be due, or may at any time thereafter become due to the Contractor under and by virtue of this Contract, or any portion thereof.

The Contractor shall familiarize himself with Ordinance No. 325 of the City of Richmond, providing for a minimum wage of \$2.50 for an eight hour day.

Richmond, California, February 8, 1915.

H. D. CHAPMAN,
City Engineer.

Received copy of within answer this 12th day of July, 1915.

J. K. JOHNSON,
Solicitor for Plaintiffs.

[Endorsed]: Filed Jul. 12, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [48]

[Title of Court and Cause.]

Opinion Directing Entry of Decree in Favor of Plaintiffs Enjoining Further Dredging and Awarding Damages.

J. K. JOHNSON and W. P. JOHNSON, for
Plaintiffs.

D. J. HALL, for Intervenor, City of Richmond.
EARL D. WHITE, for Defendant.

VAN FLEET, District Judge:

This is a bill to enjoin the defendant from further proceeding to dredge out and deepen a certain water-

way or channel traversing lands alleged to belong to the plaintiffs' testator, and from carrying away the earth or soil therefrom, as constituting a wilfull and malicious trespass and waste, and to recover damages for the waste and injury already done.

The answer of the defendant denies any ownership or right of any kind in the plaintiffs in the land involved, and sets up that the channel in question is "known and designated as the South Channel of the San Pablo Canal, all within the city limits of the city of Richmond, county of Contra Costa, State of California, and that said channel is and has been for many years last past, a navigable waterway, with a public terminus, connecting the said city of Richmond with the San Pablo Bay and the bay of San Francisco"; and that "for many years last past vessels engaged in commerce have navigated and traversed said channel"; that all the acts done and committed by defendant of which complaint is made have been had and done under and in pursuance of a contract theretofore entered into between defendant and said city of Richmond whereby "defendant agreed to dredge a channel eighty (80) feet wide, in and through said south channel of said San Pablo [49] Canal, to a uniform depth of eight (8) feet below low tide," and that the work of dredging said channel was being done by defendant "for the purpose of improving said waterway in the interest of commerce and navigation," etc. It denies that plaintiffs have suffered any damage or that defendant "has committed any wilfull or malicious or any trespass upon any property of plaintiffs." It then alleges, as ground of affirmative relief, that after defendant had

removed approximately 22,000 cubic yards of material from said channel it was stopped by the injunction issued herein and has since discontinued work under said contract, and that by reason of such interruption and delay in its work defendant has suffered damages on its part for which it asks judgment against the plaintiffs.

The city of Richmond was permitted to file a bill of intervention in which it alleges that the channel in question is a natural arm of San Pablo Bay, which is a navigable body of water within the State; "that the depth of water in said channel varies with the rise and fall of the tide, and that at ordinary low tide said channel has a minimum depth of two (2) feet, and at ordinary high tide has a minimum depth of eight (8) feet"; and after alleging substantially in the terms set up in the answer the navigation of said channel during recent years between other points and the city of Richmond, it is alleged that in order to improve the navigability of the channel and render it more suitable for commerce "it became and is necessary to deepen said channel throughout its entire length and to a width of eighty (80) feet, to a depth of eight (8) feet at ordinary low tide." It is alleged "that the city of Richmond has a population of 20,000 or upwards, and contains within its limits a large number of extensive manufacturing plants and industries; that it is essential for the best interests of the city of Richmond, its inhabitants and the public generally, that the navigability [50] of said channel be improved and increased as aforesaid, thereby affording better trans-

portation facilities for the city of Richmond, its inhabitants and the public generally.” It admits the entering into the contract as set up by defendant for the deepening and widening of the channel, and alleges that it has procured for that purpose a permit from the War Department of the United States for such improvement. It denies any right or title in plaintiffs in or to the premises involved, or that any soil or other thing of value is being taken from plaintiffs’ property.

In response to the bill of intervention the plaintiffs filed an answer denying all its allegations as to the navigability or commercial value of said channel, and alleging that the intervenor and the Standard Oil Company of California have entered into a contract “whereby it was agreed that the city of Richmond should cause the dirt or soil dredged or taken from the property of plaintiffs to be deposited upon the property of the Standard Oil Company of California, and that it should pay to the city of Richmond ten and 74/100 cents per cubic yard therefor, that being the exact price that the city of Richmond agreed to pay the defendant herein, North American Dredging Company of Nevada for dredging said alleged channel as aforesaid, and that the aim and purpose of said agreement between the Standard Oil Company and the city of Richmond was that the Standard Oil Company should pay for said dredging, and thereby receive and obtain the property of plaintiffs without paying them therefor.” And it is alleged that if said channel is deepened in accordance with the contract between the intervenor and the defendant “it

will enable the Standard Oil Company of California to obtain a waterway to the San Pablo Bay over and across and upon the land and property of plaintiffs." There is a further allegation that the city contemplates using the dredged channel as [51] an open sewer; but no evidence was offered on the subject and it may be disregarded.

The evidence shows that the channel in question, which is about a mile in length, runs in its entire course through a tract of salt marsh or tide land comprising some 500 acres more or less, having its northerly boundary on San Pablo Bay, and extending southerly for a distance of a mile, more or less, between a natural waterway known as San Pablo Canal or Creek, which borders it on the east, and the potrero or highlands, constituting the San Pablo peninsula, on the west. This land was acquired by Dr. Tewksbury, the grandfather of the plaintiffs, in the early '70's by grant from those holding patents from the State under the State Tide Land Act, (Stats. 1867-8, p. 716; Stats. 1869-70, p. 541); and the title has been regularly transmitted to plaintiffs' testator, in whose estate it now rests. Like all lands of its character on the margins of the sea, its bays and inlets, it is subject to tidal action, being largely submerged at flood tide and mostly exposed at its lower stages. As disclosed on the map, and by a personal inspection made by the Court, it is intersected by many tidal sloughs or creeks, cut by the flux and recession of the waters of the bay in their diurnal flow, some of them of considerable magnitude and others dwindling to mere ditches or rivu-

lets. At the height of the tide many of these sloughs have a considerable depth of water, while at its lowest stages, in most of them, the mud bottom lies exposed, or practically so. The particular channel in controversy branches from San Pablo Canal or Creek, a stream of much greater magnitude, a short distance south from where the latter debouches from the marsh land into San Pablo Bay, and thence winds its way in a general southerly direction throughout the length of the tract of land above-described. It varies in width and depth, being in its [52] lower reaches as wide as 100 feet or over, and narrowing somewhat farther south; with a depth dependent upon the state of the tide of from two feet or less at low tide in its shallowest parts toward the south, to approximately seven or eight feet at its flood, and deepening somewhat as it flows to its mouth and enters the San Pablo Canal.

Neither the channel nor the land underlying it was excepted from the grant by the State to its patentees of the tide lands through which it runs, nor in the deeds from the latter conveying the title to plaintiffs' ancestor, nor is the channel in any way referred to or mentioned in said conveyances; nor, so far as appears, has it ever been meandered by the State or designated among the streams or waterways declared navigable in its statutes. While referred to in the answer as the "South Channel of San Pablo Canal," it bears no name or designation on the official map. At the time Dr. Tewksbury acquired these tide lands and for many years thereafter there was no settlement in the immediate

neighborhood, the contiguous highlands being devoted to farming and grazing, for which latter purpose the marsh lands were included so far as available. It was for this purpose, apparently, that Dr. Tewksbury acquired the marsh lands. He owned a large acreage in the adjacent highlands, and the evidence shows that shortly after the acquisition of the marsh lands he constructed a dyke across them near their northern boundary to keep out the tide and render the land more available for pasturage—much of the grasses growing thereon making good food when the waters were kept out. This dyke, but for a tide-gate therein, was built solidly across the channel in question, and the evidence tends to show that it was maintained for many years—as late as 1901—in a condition efficient to restrain the influx of the tide and render the lands more available for pasturage of cattle. [53] Since then the dyke has largely disappeared and no longer obstructs the channel, although evidence of its existence remains. During all these years, while San Pablo Canal was navigated to some extent, the channels and sloughs intersecting these lands, including the one in controversy, were never used or regarded as available for any species of navigation other than for duck boats or punts for hunting and fishing; no larger craft ever attempting to traverse them. This condition continued down to about the year 1900 or a little later. About that time the Santa Fe Railroad determined on Point Richmond as a terminus on San Francisco Bay, and immediately thereafter the town or city of Richmond sprang up. The latter is built

upon the highlands to the south and west of the marsh lands in question, and these highlands extending northerly in a peninsula terminating in San Pablo Point partially divide the waters of San Pablo Bay from the bay of San Francisco, of which it constitutes an arm. When incorporated some years since the corporate limits of the town were made to include this body of tide lands, but the latter remains unreclaimed and unimproved except by the Standard Oil Company as hereinafter stated. The town has now grown to a place of considerable population and commercial importance, with a deep water harbor on the eastern shore of the bay of San Francisco.

Some years since the Standard Oil Company of California established a refining plant at Richmond, its site covering a considerable acreage of highland and including a portion of tide or marsh land purchased by it from plaintiffs' testator off the southerly end of the tract above-described. At that time the slough or channel in question continued into or through the portion of the marsh land acquired by the Oil Company, but the latter has since built a levee or bulkhead across the channel and along the northern boundary of its marsh lands, and has either wholly or partially filled in the channel where it crosses its land. [54] Immediately north of the marsh land sold to the Oil Company is an unimproved strip of land about 200 feet wide, sold by the plaintiffs' predecessors to the Belt Line Railroad, which narrow strip runs across the marsh between the lands of the Oil Company and the present hold-

ings of the plaintiffs, forming the southerly boundary of the latter and the northerly boundary of the former.

It is only since the establishment of the Oil Company's Works that any effort has been made to navigate the channel by craft of burden, and the evidence shows in that regard that upon some few occasions power boats and scows of light draft have been taken up through San Pablo Creek or Canal and into this channel on the flood tide, carrying some small amount of material for the use of the Oil Company; but it was found that excepting at such periods of high tide, it was impracticable to put the channel to such use without deepening it for the purpose. Accordingly the dredging work which the bill seeks to stop was commenced in 1915 as the result of an arrangement between the Oil Company and the city, whereby the latter contracted with the defendant to do the work of dredging the channel as set forth in the pleadings, and the Oil Company, in consideration of the removed soil being deposited on its land within its levee or bulkhead, contracted with the city to pay it the same price per yard for the material which the city was to pay the defendant for its removal. Upon the theory that the channel constituted a public navigable waterway, and its improvement a benefit to navigation, a permit from the officers of the War Department for the prosecution of the work was procured. The dredging operations were commenced at the levee or bulkhead of the Oil Company working northerly, and some 900 feet or over of the channel at the south end had been

dredged and about 22,000 cubic yards of material removed when stopped by the preliminary injunction procured by the plaintiff.

1. The presentation of the case by the defendant and the [55] intervenor proceeds largely, if not entirely, upon the theory that its determination turns solely upon the question whether the channel involved is a navigable waterway, which they affirm it to be, and as such subject to improvement by the authorities for the benefit of commerce and navigation. Of course if it is a navigable stream there can be no question that, whatever may be the rights of the plaintiffs as riparian proprietors in the land underlying the stream below mean high water line, they are held in subordination to the public right of navigation, and the coincident right to employ all appropriate means to improve the channel for such purpose. *Willink vs. United States*, 240 U. S. 572; *Greenleaf Johnson Lumber Co. vs. Garrison*, 237 U. S. 251. But under the circumstances disclosed here as to the arrangement under which the work sought to be enjoined is being done and the dredged material disposed of, a question arises whether the rights of the plaintiffs are not being unlawfully invaded independently of the consideration whether the channel in question is or is not navigable. That the evidence is sufficient to show a valid legal title in the plaintiffs to the land through which it runs, including the soil underlying the channel itself, is not challenged in the argument, nor is the proposition open to dispute. (*Knudson vs. Kearney*, 171 Cal. 250, and cases there cited.) Nor is there any ques-

tion that it is for the State to determine whether she will part with the title to the lands underlying her waters, navigable or otherwise, and vest it in private ownership. *Donnelly vs. United States*, 228 U. S. 243. In that case it is said (p. 261): "In *Barney v. Keokuk*, 94 U. S. 224, 388, it was held that it is for the States to establish for themselves such rules of property as they may deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent thereto.

. . . If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." And it is further [56] said (page 262): "But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several States. Thus the State of California, if she sees fit may confer upon the riparian owners the title to the bed of any navigable stream within her borders."

Such being the law, we may assume for present purposes that this is a navigable waterway, for it nevertheless appears that the plaintiffs own the soil underlying it to the same extent and by precisely the same title as they hold the riparian lands upon its banks, subject only as to the submerged soil that their right is subordinate to the right of navigation, which may require its removal for the improvement of the stream. But none of the cases hold, and it is not the law, that for such purpose more than another the soil of the riparian proprietor may be

taken and carried away without his consent and without compensation and transferred to another in private ownership. And yet that is what is being done under the arrangement by which the work in this instance is being carried out—the soil of plaintiffs being taken and deposited on the land of the Standard Oil Company for the betterment of the latter. It is not a question of the value of the thing taken, but one of ownership—of property rights. Whatever the value may be, property cannot be thus taken without compensation.

It would seem, therefore, that the plaintiffs are entitled to have the removal and appropriation of their soil, as disclosed in the evidence, stopped, independently of the question of the navigability of the stream.

2. But do the facts show this channel to be a navigable waterway in the sense and for the purpose contended for? This is largely a question of fact to be determined from the character of the stream, its situation and availability as a highway of [57] commerce, and the other surrounding circumstances affecting the question. While courts take judicial cognizance of the navigable character of large and well-known bodies of water, like our Great Lakes, or of streams like the Mississippi or Ohio, as to those of a more insignificant character, the history and nature of which are less known, the fact of navigability must be established by evidence, and the burden of proof rests on the party asserting that character. *Harrison vs. Fite*, 148 Fed. 781. The mere depth of water will not place a stream in the cate-

gory of a navigable waterway, other essentials being absent; nor, on the other hand, will the want of depth or capacity in part of its course take a stream out of that category if the other characteristics are present. Nor does the mere fact that it is a stream in which the tide ebbs and flows necessarily tend to any extent to demonstrate its navigable character. As stated by Chief Justice Shaw in *Rowe vs. The Granite Bridge Company*, 21 Pick. 344:

“It is not every ditch in which the salt water ebbs and flows, through the extensive salt marshes along the *cost*, and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream. Nor is it every small creek, in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable. But in order to have this character, it must be navigable to some purpose, useful to trade or agriculture. It is not a mere possibility of being used under some circumstances, as at extraordinary high tides, which will give it the character of a navigable stream, but it must be generally and commonly useful to some purpose of trade or agriculture.”

The essentials of a navigable stream or waterway are thus stated by the Circuit Court of Appeals for the Eighth Circuit in *Harrison vs. Fite*, *supra*:

“To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the

transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious and [58] unprofitable, is not sufficient. . . . Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a water course must have a useful capacity as a public highway of transportation."

In *People vs. Economy Light & Power Co.*, 89 N. E. 760, 768, it is said:

"To hold that the State can, by artificial means, make a stream navigable which in a state of nature is not navigable, and thereby deprive riparian owners of their property rights in the bed of the stream, is simply to say that private property may be taken for public use without compensation."

See also *Chisolm vs. Caines*, 67 Fed. 285; *Loevy vs. United States*, 177 U. S. 621; *Wilson vs. Prickett*, 139 Pac. 754.

In his work on *Irrigation and Water Rights* Mr. Kinney, treating of navigable waters, states (Vol. 1, p. 570) the principle that, "A stream which can only be made navigable or floatable by artificial means is

not a public highway.” And at page 567 the author says: “In order to be a public body of water, it must be accessible to the public, and have a terminus by which the public can enter it and another from which they can leave it. Hence, creeks which open in navigable waters, but merely lead into private lands are not public navigable waters.”

When these principles are applied to the facts in this case it is quite apparent, I think, that the latter are lacking in several essentials required to constitute this slough a public navigable waterway. As we have seen, it has never been in fact navigated in any true sense, and has not been treated or considered, either by the public or by the State, as capable of navigation. While this lack of recognition by the State is not conclusive, it is nevertheless not without potency as a fact in its bearing on the question, since it is not to be lightly presumed that the State will part with its title to property of known or recognized value for public use. But, in the next place, the conceded necessity of the work sought to be prosecuted is a [59] recognition that the channel is not susceptible of being navigated in its present state without artificial aid. And the facts, I think, sufficiently demonstrate that this work, instead of being intended for the improvement of a navigable stream, is really intended to render navigable a stream not so in its natural state. Nor does the evidence show that the channel is or will be in any true sense useful to the public for the purpose of navigation. It is true it is now within the corporate limits of the City of Richmond, which in that sense may be said to con-

stitute a public terminus. But, as the evidence shows, it lies only at its "back door," so to speak, runs wholly through private property, and is so situated that its use is, and so far as appears can be, available only to the Oil Company, and the Belt Railroad, should the latter see fit to construct an approach. It is not accessible or available to the public nor to any other private industry, the evidence showing that the nearest established street of the town is at least a quarter of a mile from its southern terminus. Under the principles above stated, I am satisfied that the Court would not be justified upon the facts in holding this channel to be a navigable stream.

It results that a decree must go in favor of the plaintiffs enjoining the further prosecution of the work in question, and awarding them such damages as they may have suffered, with their costs. Should the amount of the damages not be agreed upon a reference may be had for its ascertainment.

[Endorsed]: Filed August 28, 1916, Walter B. Maling, Clerk. [60]

[Title of Court and Cause.]

Interlocutory Decree.

This cause came on to be heard at this term and was argued by counsel; and thereupon upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

That the defendant, North American Dredging Company of Nevada, a corporation, and the inter-

venor, City of Richmond, a municipal corporation, and their and each of their officers, agents, servants, employees and attorneys be, and they and each of them hereby are, and is, enjoined from, and they and each and everyone of them do desist and refrain from cutting, dredging or excavating any ditch or canal or carrying away the dirt or soil upon the property of the plaintiffs and described as all of that certain land and real property situated in the County of Contra Costa, State of California, and described as being a portion of Survey No. 190, Swamp and Overflowed Lands in S. $\frac{1}{2}$ Sections 10 and 11, W. $\frac{1}{2}$ Section 14, N. $\frac{1}{2}$ S. W. $\frac{1}{4}$ Section 14 and E. $\frac{1}{2}$ Section 15, all in Township 1 N., R. 5 W., Mount Diablo Base and Meridian, and containing 342.10 acres more or less.

Also all of the salt marsh and tide land which lies upon the westerly side of a certain slough or tide creek known as "Peter Davis Creek" situated in Contra Costa County and which is embraced in Survey No. 5 of Contra Costa County for State salt marsh and tide lands. Said lands being more particularly described as follows, to wit:

The fractional S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Section 2, and the West $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of Section Eleven (11) in Township 1 North, Range 5 West, Mount Diablo Meridian.

Also Surveys No. 6 and 7 State Tide Lands, Contra Costa County, Township No. 1 North, Range No. 5 West, Mount Diablo [61] Meridian; Section No. 3; and 10 Being the fractional S. E. $\frac{1}{4}$, fractional S. W. $\frac{1}{4}$ of Section 3 and fractional N. E. $\frac{1}{4}$ and

fractional N. W. $\frac{1}{4}$ of Section 10, more particularly described in field-notes of said survey as follows: All the tide land lying between the U. S. meander-line and the shore of San Pablo Bay in the southwest quarter of Section Three and in the northwest quarter of Section Ten, Township One North, Range Five West, Mount Diablo Meridian, containing Thirty-eight $\frac{2}{100}$ acres; and all the tide land lying between the U. S. meander-line and San Pablo Bay and Slough in the southeast quarter of Section Three, and in the northeast quarter of Section Ten, Township One North, Range Five West, Mount Diablo Meridian, containing one hundred and eighty-seven $\frac{71}{100}$ acres, and containing in both surveys two hundred and twenty-five $\frac{72}{100}$ acres, being more fully described in Tide Land Surveys No. 6 and 7 Contra Costa County.

And it is further ordered that an accounting of the loss and damage suffered by plaintiffs by reason of the acts of defendant and intervenor be referred to Harry M. Wright, Esq., Master in Chancery, to hear testimony as to such loss and damage, and to take an accounting thereof, and report the same together with his findings thereon to the Court, and also that plaintiffs have and recover judgment for their costs in this behalf expended.

Dated September 1st, 1916.

WM. C. VAN FLEET,
Judge of the District Court.

[Endorsed]: Filed and entered September 1, 1916. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [62]

[Title of Court and Cause.]

Proceedings Had Before Honorable Wm. C. Van Fleet, Judge.

Commencing on Friday, December 17th, 1915.

J. K. Johnson, appearing as solicitor for plaintiffs, and Earl D. White, appearing as solicitor for defendant and D. J. Hall, appearing as solicitor for intervenor.

Thereupon the following proceedings were had:

Plaintiffs offered and Court admitted evidence of plaintiffs' title to the land and property described in the amended bill of plaintiffs' on file herein and proved their title to the said land described in said amended bill of complaint as set forth in amended bill of complaint, with the exception of the strip of land about one hundred or two hundred feet wide owned by the Belt Railroad Company, running across the lands of plaintiffs and coming out near the point marked "No. 20" on a map admitted in evidence and marked "Plaintiffs' Exhibit 10."

Testimony of Lucio M. Mintzer, for Plaintiffs.

LUCIO M. MINTZER, being first duly sworn, as a witness on behalf of plaintiffs, testified as follows:

I am one of the plaintiffs in this case and reside in San Francisco. I know the situation of the land described in our amended bill, the description referred to in the evidence and deeds of conveyance just read in court. I recognize what the map now shown me refers to. The Standard Oil property is located down on this section here (indicated by the letter "A"). The location of the tract of land referred to

(Testimony of Lucio M. Mintzer.)

in our Amended Bills is west of this slough, which I marked "B." running up to the shore line bay. They include the shaded portion west of the slough which I have marked "B," and east of what is known as "Potrero" on this map. [63] The shaded portion is the property described in our Amended Bill. The slough which defendant has attempted to dredge is about half way between the slough marked "B" and the "Potrero. It is indicated on the map with the letter "C." Our holdings are all of this shaded line north of the Standard Oil holdings and west of the slough "B," east of the "Potrero," with the exception of the strip here which is owned by the Belt Railroad Company. I think this strip is 100 or 200 feet wide. It comes across about as far as this slough and then it comes up to the north and comes out at about that point there which I will mark on this embankment "No. 20." It is the Richmond Belt Line right of way, but there is nothing constructed on it. (Map is here offered in evidence and marked "Exhibit 10" for the purpose of illustration.) The character of the land which I have indicated to the Court and which is described in our Amended Bill is marsh land. I saw this property in the month of May, 1915. I saw the defendant's dredger on the land; I am not sure, it was in May or it was either in the latter part of April or May. I saw the dredger in the slough which runs through this land, the land in suit, I saw the dredger not at work, but I saw it there before we filed the suit. The dredger was standing on the bottom of the slough, on the mud you might say. It

(Testimony of Lucio M. Mintzer.)

was not working at the time I saw it. There was a pile of mud and apparently gravel or rock that appeared to have been taken out by this dredger and put on the ground of the Standard Oil Company.

Cross-examination.

The character of the land adjacent and on either side of the canal that empties into the channel, which I have marked "C," was mud. I don't know whether it was very deep mud, but there was mud there in which were growing tules and other kinds of marsh grass. The water-way "C" flows into what is known as San Pablo Creek, I think. San Pablo Creek flows into San Pablo Bay. [64]

The COURT.—The Court will take judicial cognizance of that, that is an arm of San Francisco Bay.

The tide does not ebb and flow over all of the land adjacent to the water-way, marked "C," except one time I saw a lot of land under water and that was after a very heavy rain in March 1913; at that time the whole marsh there was covered with water. The tide does not cover this marsh land daily at flood. It is above the ordinary flow of the tide. All of it with the exception of some of these sloughs around here which high tide does get into. I have never seen this land entirely submerged with water at ordinary high tide. I should say from what I have seen of it, and I have seen it at very high tide, that it is not. I would not say that the tide ebbs and flows over the entire length of the water-way up to the line of the Richmond Belt Railroad. I have never seen it that

(Testimony of Lucio M. Mintzer.)

way. When I saw the dredger in this slough I should say it was between two and three hundred feet of the land of the Standard Oil Company. I will indicate its position on the map and mark it "D." I think this was about April 1915, I was on this slough marked "C" possibly the first time in 1912 or 1913. I have not had much knowledge of it, I do not know its character as to navigability. I have never seen any vessels running up there before I saw this dredger in there. This canal which I have designated as "C" extends from San Pablo Creek through our land and on beyond the property of the Richmond Belt Line Railroad to the property of the Standard Oil Company, which I have designated here as "A."

Testimony of John H. Nicholl, for Plaintiffs.

JOHN H. NICHOLL being first duly sworn as a witness on behalf of plaintiffs, testified as follows:

I reside in Oakland; I was born in San Leandro, Cal. I have been acquainted with the locality now known as the city of Richmond and San Pablo basin, San Pablo Canal in Contra Costa [65] County, and with the property in that locality all my life. I recognize this map now shown me, marked "Sale Map 11" salt marsh and tide lands situated in the counties of Alameda and Contra Costa, State of California. This map is my property; it indicates the property near what is now the city of Richmond and is located in the city of Richmond in or about the San Pablo Canal. I know this property in controversy. I knew Dr. Tewksbury. I know the property that he

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(Testimony of John H. Nicholl.)

had in the Rancho de San Pablo and also the land in the marsh east of that and between the horns of the San Pablo Rancho. When I was a small boy I used to hunt on the marsh property. I was shooting out there in 1868. In the early 70's Dr. Tewksbury conceived the idea that he would reclaim this land so he started to put a levee across from here and part over there (indicating on map) The dike that I have pointed out here runs in the northern part of Section 10, just south of the line of Section 3. This map is one of the maps that was issued by the state during the time the salt marsh and tide lands were sold in 1871 under the Act providing for the sale of salt, marsh and tide lands. The dike referred to comes further over. It comes into Section 2. It comes over to here (indicating). It runs clear through to the high land. I saw some of the levee built. It was built by Dr. Tewksbury somewhere between 1868 and 71; I should judge about 1870. Here is where that started from (indicating). Here was where a Portuguese named Lucas was living. That was when I was a boy. It started right back of his place where I tied my horse, the men were working there, and I came across these sloughs and came to somewhere in here (indicating). It crossed the water-ways marked "C" and "B." There was piling in there. This levee was constructed of piling driven by wooden mallets across this water-way "B." This here marsh was peat, all full of roots and grass and one thing and another in there and Borbi built that up with big slats and made a levee 10 or [66]

(Testimony of John H. Nicholl.)

15 feet at a time. I was not acquainted with the water-way or slough marked "C," I did not pay much attention to that. This is the one we were afraid of (indicating). That was the big one. I was a boy shooting ducks at that time and I was interested in that. That was not completely shut off. There were great big timbers across there and I walked across the timbers, another boy and I. I am speaking of the big slough marked "B." This one "C" was shut off, because I walked across there. The dike as indicated on the map is the correct position, as I remember it, of that dike. There was another levee put down here at the extreme end of Potrero, the south end, (indicating). The levees were failures as far as the channel was concerned, so far as the big slough marked "B" was concerned. They could not restrain the water in channel "B." The water in "C" on this map was shut off completely because I remember that as being the slough. I got across the slough marked "C" upon the levee all one winter, then after it had gone, the tide had taken it out. The character of the land and the location of the slough, marked "C" upon the map, is salt marsh. There is salt grass, all kinds of salt grass, marsh too, in some places. In the early 70's I saw cattle turned in there grazing on the land. It was for no other purpose because they could not raise anything on it. There are factories there in the neighborhood of this slough "C" at this time, the Standard Oil. The Belt Line Railroad runs there—the Santa Fe Railroad is close by there, the shops. The slough runs

(Testimony of John H. Nicholl.)

down to near the Standard Oil Property. I guess the Standard Oil property is the only one. There was no such thing as navigating any ship on the water-way marked "C." All these hills, the "Potrero" and the "San Pablo" from the Standard Oil Company north, that never was plowed, in fact there was nothing there until the Standard Oil came, except a few ranch houses just for taking care of the cattle; there was never any need for any [67] commerce there. You could go on any of these sloughs at high tide with a scow-schooner. I never saw any boats on the slough marked "C."

Cross-examination.

In 1868 everything was improved around there except the marsh. This salt marsh is a separate piece of property. It was not a part of the San Pablo Rancho. The city of Richmond was incorporated in 1905. The land I have referred to is all within the corporate limits of the city of Richmond now. What I mean by a dike is some dirt thrown up, a rough sort of dike; but across the big slough there was piling driven with wooden mallets by Borbi. I walked across that for one winter and after that it was gone. The tide took it out. All of the water-ways there were washed out by reason of the tide action. The tide ebbs and flows in these channels. Nothing could be raised on this land. It was full of salt. The salt water was not shut out. There was some kind of grass growing that cattle lived on. The cattle were there one season and then they took them away. (Map introduced in evidence marked "Exhibit 11.")

Testimony of Antone B. Borbi, for Plaintiffs.

ANTONE B. BORBI, being first duly sworn as a witness on behalf of plaintiffs, testified as follows:

I have lived in Richmond and vicinity about 35 years. I became acquainted with Dr. Tewksbury about 1873. I leased the Potrero and marsh lands from him. I lived over there on Dr. Tewksbury's lands. There used to be a house on there somewhere. I leased all of the marsh land and the upland from the Santa Fe down to the north. I lived there and rented that land from about 1873 to 1901; that is marsh land. I pastured cattle on it from 1873 to 1901, sometimes had 200 and sometimes 250 head of cattle running there. The levee starts near the small hill here (indicating); it runs through the place to the east crossing [68] across the big slough. It crosses all the sloughs. There are four sloughs. Dr. Tewksbury built the levee before I went there. The levee was still there when I went there. It was constructed across slough marked "C"; they brought some lumber and put dirt between. The tide did not wash it out. The water could not flood except when a big storm came. It would not wash out but the water would go over the levee. The levee was maintained just as long as I was there. In 1901 one little piece washed out here somewhere in there. During that time it never got washed out across the big slough. That levee was in existence from 1873 to 1901. I repaired these levees pretty nearly every year. I raised them up and made them a little wider. That levee shut off this slough "C" so that nothing

(Testimony of Antone B. Borbi.)

could go up, boats or anything. I have not seen it for a good many years now. I don't know about it.

Cross-examination.

I know all these lands because I built those banks there. There was a small slough there that gave way but the other was all in repair when I left. I had cattle in there from June until October. I didn't have cattle in there other months because it is wet. We had tide-gates in the levee to let the water out. There was salt grass growing on this land and clover in some places. In a big storm sometimes it washed over, but not with the tides. Inside the levee in the slough marked "C" the water was 3 or 4 feet deep when the tide was out. I never saw any ship or vessel in slough marked "C."

Testimony of Benjamin Boorman, for Plaintiffs.

BENJAMIN BOORMAN, being first duly sworn as a witness on behalf of plaintiffs, testified as follows:

I have made my home at place now known as Richmond for 56 years. I know the premises referred to by the witnesses [69] in this case. I first knew this land in 1859. At first my home was within two miles of this land; it is now about 2½ miles. It is marsh land. The tide overflows it at times at high tide. I have seen it overflow—part of it, not the whole of it. The part I have seen overflowed is next to the levee and north of the levee. The levee stopped the tide from overflowing the land. The levee ran right across the sloughs and shut them off. I first

(Testimony of Benjamin Boorman.)

saw this levee about the first part of 1870. I saw it at different times right along, for 10 or 12 years. There was grass growing in places on this land. I saw cattle pastured on this land from about 1880 to 1890. The levee crossed the slough marked "C." The levee was constructed across the channel; it was timbers drove down and then filled in. They had flood-gates. The dike that crossed the slough marked "C" was constructed in a similar manner to the dike that crossed the channel "B."

Cross-examination.

It was 10 years ago, as I last remember, the levee crossed channel "C". It may have been more than 10 years ago. I could not give you the date. I have been up there within 10 years but I did not notice the levee. The land inside the levees was pastured. There was a fence there to keep them off in wet times. I never saw any stock there in winter. There was a fence running out here (indicating). I never saw cattle ranging in this portion of the land where the channel "C" is, but I saw them all through here (pointing to the property of the Standard Oil Company). I thing the cattle pastured down as far as the levee in some places, but some places they could not get in. I think there was a levee there that cut them off. The cattle could not pasture north of the levee that I saw in the early 70's. This land isn't submerged unless it is high tide. I don't think ordinary high tide covers it all. I should say this levee has not been maintained across channel "C" since about 1900. [70] I knew Mr. Borbi; he was a ten-

(Testimony of Benjamin Boorman.)

ant of Dr. Tewksbury and his wife, Emily S. Tewksbury after the Doctor's death. That was up to about 1901.

Testimony of A. C. Faris, for Plaintiffs.

A. C. FARIS, being first duly sworn as a witness on behalf of plaintiffs, testified as follows:

I am city clerk of the city of Richmond. I have brought with me an agreement that the Standard Oil Company entered into by the city of Richmond and the Standard Oil Company sometime in April of last year, requiring the dumping of the dredgings of the south branch of the San Pablo levee or channel upon the land of the Standard Oil Company. That document is on record in the files of my office.

Mr. JOHNSON.—I now offer this agreement in evidence; it is dated the 30th of March 1915, between the Standard Oil Company and the city of Richmond.

The COURT.—Very well, let it go in.

Mr. WHITE.—I object upon the ground that it is immaterial, irrelevant and incompetent. It does not tend to prove any issues in this case; is not a contract binding on this defendant. Defendant is not a party to it; is in no wise bound by it.

(After discussion.)

The COURT.—That only bears upon the question of its navigability—whether it is a navigable stream or not. Whether it has ever been recorded or treated as such. I do not see any harm to this. Let the matter go in.

(Testimony of A. C. Faris.)

(Contract introduced in evidence. Marked Plaintiff's Exhibit C.)

Mr. WHITE.—Exception. (Assignment of Error No. 5.)

Testimony of A. C. Chapman, for Plaintiffs.

A. C. CHAPMAN, being first duly sworn as a witness on behalf of plaintiffs, testified as follows:

I am city engineer and superintendent of streets. I know [71] where the dredger was located on the 15th of May. On the 15th of May, if I recall it, in the neighborhood of 10,000 yards of dredging had been taken out. It might have been 20,000 yards. I should say they were under one-half mile north of the north line of the Standard Oil holdings.

PLAINTIFF RESTS.

Testimony of Thomas H. Rees, for Defendant.

THOMAS H. REES, being first duly sworn as a witness on behalf of defendant and intervenor, testified as follows:

I reside in San Francisco. I am a Lieutenant-Colonel, Corps of Engineers of the U. S. Army in charge of the Government Engineers' Office in San Francisco. I have held that position about 4½ years. I am in local charge of the improvement of the water-ways around San Francisco Bay. There are some particular cases of improvements or works in navigable waters for which I issue permits by authority of the Secretary of War. (Witness is here shown document.) That is my signature; it was signed on the 21st day of July, 1914. I have seen

(Testimony of Thomas H. Rees.)

the body of water marked "South Channel San Pablo Canal" upon the map attached to the document and which I have identified. Permit issued by Thos. H. Rees, Lieutenant-Colonel Corps of Engineers to the city of Richmond to dredge the South Channel of the San Pablo Canal offered in evidence, marked "Defendant's Exhibit "A" for identification.) I have navigated the channel in question with a power boat, about 86 feet long, about 16 feet beam and drawing about 5 feet 9 inches to 6 feet. The channel I refer to is the one marked "C." I went up to a point where a dredge was lying and there was evidence that some dredger work had been done. The material from the dredge was piled up in banks and levees at the point where we stopped. It was quite near some of the works of the Standard Oil Company. There was a levee near [72] the line of the Standard Oil property. We went through the levee at the south side and went up what appeared to be a dredged channel from the higher ground to the west. We turned at the injunction from the main slough with the dredged channel. We went up just before high tide. The tide was still rising or flooding when we came out of the stream. While we were in the dredged channel a photograph was taken of my vessel. The name of the vessel was "The Suisun." That is the photograph of the boat we were on at the time. (Photograph introduced in evidence and marked "Defendant's Exhibit 2.") This is the channel (indicating channel "C" on the map) which I have testified to having navigated. We came into San Pablo

(Testimony of Thomas H. Rees.)

Bay, into the mouth of San Pablo Canal, and then into the south channel of San Pablo Canal. The south channel of San Pablo Canal is varying in width, some places not over 100 feet wide between the marsh land on either side and other places perhaps 200 feet or more. I had soundings taken as we came in and out. In this channel they ran generally 11 to 12 feet, sometimes up to 15 or 16. At one point there was a single sounding of 17 feet. There was evidence of this channel having been dredged out, only near the head of it. I observed the land on either side of channel "C" as shown on Plaintiffs' Exhibit 10. So far as I could see the immediate banks were covered with water. The salt marsh on either side so far as I could see was about a-wash. The water was just covering it generally. The grass was sticking up above the water. Some little distance away it was impossible to tell whether the ground was above water or whether it was only the grass. I saw no evidence of any obstructions or dikes. I made the trip on the 8th of December, 1915. This photograph marked Defendant's Exhibit "C," represents the locality at the head of the slough marked "C." It shows the dredged out and the spill-banks of dredged material and the dredger in the position [73] apparently where it was lying when I visited the place. The exposed place running out here (indicating) is the levee and this (indicating) is the marsh land. The channel runs from this side (indicating).

Cross-examination.

I went up San Pablo Canal at 11 o'clock in the

(Testimony of Thomas H. Rees.)

morning of December 8th. This was the only trip I made. I had soundings taken with a lead-line while going up and coming out. It was near at flood tide while we went in and out. This was the most favorable condition for going up there and coming out. I know nothing about the condition of the channel prior to that time. My boat drew about 6 feet of water. The sounding showed a slight variation in depth averaging from 11 to 12 feet, some deeper places were 15 or 16 feet and one place was some 7 feet in the channel. I do not know whether we were in the deepest channel or not. The depth was not less than 7 feet in the channel. Out in the flats in the bay when we were coming up we got 6 feet. My recollection is that the *predicated* tide in the tide tables for that tide was 6.8 feet. Within a quarter of a mile of the Standard Oil line the soundings, I think were not so deep as they were in other parts of the south channel of San Pablo Canal. They were deeper out farther as we went north. This channel is shown on the regular maps of the Coast and Geodetic Survey, but the maps do not indicate whether or not it is navigable. At a sharp point down toward the mouth of this channel toward the northerly end where a point makes out from the westerly side of the channel so that a boat would have to make a sharp turn there and get close to that point (indicating point on map attached to permit designated as Defendant's Exhibit "A" for identification) the sounding of 7 feet was taken. For a quarter of a mile or so going north from the line of the Standard

(Testimony of Thomas H. Rees.)

Oil property the soundings were more shallow than the deepest soundings farther north. [74] Some of the soundings further north were about the same as those in the portion between the Standard Oil and one mile north on the channel. The soundings for a quarter of a mile north of the Standard Oil line running from 10 to 12 feet generally with some deeper soundings up to 16 feet, with the exception of a sounding of 7 feet at a sharp point I mentioned. Defendant then introduced document marked Defendant's Exhibit "E," the same being headed "War Department, Office of Chief Engineers, Washington, June 30, 1914, General Orders, April 8th." Witness testified that before issuing this permit he received information concerning navigability of the channel from the city of Richmond, being furnished with the description of the channel and with a photograph showing a boat in the channel and at the head of the channel and that he believes information was furnished by the city attorney of the city of Richmond.

Testimony of H. E. Aine, for Defendant.

H. E. AINE, being first duly sworn as a witness for defendant and intervenor, testified as follows:

I reside in Richmond. I am assistant chief engineer of the Standard Oil Company, have been for 14 years. I have been around Richmond for the last 40 years. I became familiar with these lands when I was about 16 years old. I have been on them quite frequently for the last 26 or 28 years. I have hunted upon these lands. I have been over the channels oftentimes in boats. The lands on the map, marked

(Testimony of H. E. Aine.)

"Plaintiffs' Exhibit 10" are absolutely salt marsh lands. I have known channel "C" marked on this map ever since I went around there. When I was a boy about 16 years old we used to go up and down there in duck boats. There was no commerce done on it that I know of, but we used to travel up and down that stream considerably with duck boats and flat boats. In 1907 I piloted a launch which brought up through this channel several loads of piling which [75] were delivered at the Standard Oil Company's property and brought in for use of the Standard Oil property. In 1914 I piloted up a barge and also a gasoline launch. Within a few days apart I piloted up the 'Petroleum No. 3' and stern-wheeler. I was partly the helper in bringing up Colonel Rees' boat on the trip that he testified to. There were some levees on shore, but if there were any levees put in there across the channel they were across before any time that I can remember of. I have seen signs of the levees on land. One right across here from the Standard Oil property (witness here marks on "Plaintiffs' Exhibit 10" cross marks at different points showing position of levee). This may not be precisely correct but it is in that general direction across here. The only thing that is left of the levee further north testified to here is a few posts still standing marked at this point. (Witness here marks with an X.) I am now marking in channel "C." But no time since I have been familiar with the conditions there has there been any obstruction on channel "C." I am familiar with the location of the Vulcan

(Testimony of H. E. Aine.)

Powder Plant (witness on direction of Court here marks on map the word "Vulcan"). I have never seen cattle grazing on any of these lands north of the line which I have drawn of the southerly levee line. Where the old road crosses here (indicating on map) was where the back-bone is between the main line and the Potrero and on either side of it for a considerable distance, say $\frac{1}{4}$ or $\frac{1}{2}$ mile, it is reasonably salt ground where grass may grow or cattle may range, but as you go north the further north you go the more you get into the marsh country, and it is impossible for anybody to walk on foot across there, much less cattle. That is during all seasons of the year. At low tide it is impossible to cross any of the mud sloughs. The mud naturally gets deeper as you go along there but at the Standard Oil property the mud down to the blue clay line is from 16 to 18 [76] feet. The Standard Oil Company has built quite a number of dikes. Their main dike shown on this map is on the black line. We also have another one within that one right across the property. We also have another one right up in here (indicating). The photograph now shown me marked Defendant's Exhibit "C" represents the steamer "Suisun" very close to the end of the channel "C" where it connects with the Standard Oil channel and runs to the main land. The Standard Oil channel is a dredged channel going up to the Belt Line and it ends on a city street. I don't know the name of the street. That comes behind the Standard Oil plant. By the Belt Line I mean the Richmond Belt Line Railway which begins

(Testimony of H. E. Aine.)

at the Standard Oil Refinery and runs to Winehaven. It connects with both the Southern Pacific and the Santa Fe. It runs past the Standard Oil property around to Winehaven. This dredged channel connecting with channel "C" ends about 100 feet from the Richmond Belt Line Railway. The Richmond Belt Line Railway appears in that picture (Defendant's Exhibit "C") in the foreground. This picture was taken on the 8th of December, the day of the visit of Colonel Rees. It correctly represents the condition of the land as to being covered with water at that time. I recognize the picture marked Defendant's Exhibit "B." I saw the picture taken. I observed the conditions in relation to the channel and the land there generally. The picture marked Plaintiffs' Exhibit "D" is a correct representation of the condition existing at the time when Colonel Rees' boat came in there. (Witness shown Defendant's Exhibit "D.") I locate channel "C" on this picture. The channel shows very plainly in the picture. There is a boat in the channel. I know the scow-schooner "Ada McKewen." She brought in a load of rock for us in March 1914 to the point where this creek, designated as "C," connects with our property. That is where our levee crosses the channel [77] "C." There were pictures taken before she came in. I was present when "Ada McKewen" came in and saw the photograph taken. I have been up the channel with the steamer "Petroleum" in March 1914. The channel had not been dredged out prior to the time these boats went up there. Channel "C" is levied

(Testimony of H. E. Aine.)

off at that point (showing). It was practically a marsh from there on. That was about the head end of the slough at that time. The reason we levied off the end of the slough was because we disposed of about 25 to 27 million gallons per day which we used for condensing purposes in the refinery and that water carries a certain percentage of oil waste. To save that oil and to keep it from going out into the bay, which is against the Fish Commissioners' rules, we have to separate that water and it is inside this levee that we separate the water from the oil. The picture which I have testified to correctly represents the steamer "Petroleum" as she laid at the time the picture was taken. (Photograph introduced in evidence marked Defendant's Exhibit "G.") I know the craft known as the "Shasta." I was instrumental in piloting it into this channel (channel "C") to the terminal of the water-way, that is to a point within 100 feet of the Belt Line. I saw the photograph taken of the "Shasta" as she lay there. This was December 1915. She carried a cargo of 60 yards of crushed rock. (Photograph introduced in evidence and marked Defendant's Exhibit "H.") I know about the depth of water in channel "C" at various points. Starting at a point where the Standard Oil levee is, from there on, at a zero tide, it starts in at about 4 feet, at least it did until it was dredged there, and ran along in here to a depth of about 8 feet at zero tide and at this point (indicating) it runs up to 12, to a height of about 16 feet at zero tide right at the entrance to the mouth of the channel. The channel

(Testimony of H. E. Aine.)

deepened as you went north; about midway of the [78] channel between the Standard Oil refinery and the mouth of the channel there was in the neighborhood of about 8 feet of water at low tide. At a point where the supposed levee crosses it the channel has a depth of something like 12 feet at low tide approximately. Zero is the Coast Survey tide, the point at which the tides are marked for their height. At ordinary high tide the lands in question are pretty well covered with water. All the sloughs leading into this main channel are pretty well filled up, some overflowing the banks. There are many flats there that are covered at almost every tide. This dredged channel terminates near the asphalt department of the Standard Oil plant. Asphalt is handled in barrels, mostly over the Belt Line at this time. This channel could be used for any commercial purposes there.

Cross-examination.

The launch that towed the piling up there was a gasoline launch, a reasonably fair-sized boat. She drew about 5 feet of water. The "Ada McKewen" is a power scow boat. It drew about 5 feet loaded. The "Petroleum No. 3" is a stern-wheeler steamer. I took it up about two days after the other one on the flood tide. All boats went in and out on high tide. There were several boats came up after that. The "Ada McKewen" was bringing rock for the Standard Oil. The Standard Oil plant was started in 1901.

Testimony of A. C. Faris, for Defendant (Recalled).

A. C. FARIS, recalled for the defendant.

Identifies the original contract between the City of Richmond and the North American Dredging Company, wherein the North American Dredging Company agrees to dredge the south channel of the San Pablo Canal for the city of Richmond, in accordance with the plans and specifications attached to the contract for the sum of \$.1074 per cubic yard. Contract admitted read in evidence and original withdrawn. [79]

Testimony of Fred Klesow, for Defendant.

FRED KLESOW, being first duly sworn as a witness for defendant and intervenor, testified as follows:

I reside in San Francisco and am a master mariner, bay and river trade. I am in charge of the schooner "Shasta." I am familiar with the lands in question here, being the lands in the vicinity of the Standard Oil plant shown on Plaintiffs' Exhibit 10. I was on this land first about 1882, '83, '84. I navigated these streams with a vessel named the "Lookout" with about 50 tons. She was about 4 feet 9 draft. I am familiar with the markings on this map (Plaintiffs' Exhibit 10). I used to go up the stream called San Pablo Creek. I used to go up to the place called the Vulcan Powder Works. We were there once a week sometimes once in three weeks and so on for three years. They called this San Pablo Creek. That is the stream marked on the map as "B." During these years I navigated

(Testimony of Fred Klesow.)

the stream marked "C." After the Vulcan Powder Works went out of business I came occasionally around here (showing) in bad weather. I have navigated this channel "C" this month. I brought up a load of rock for the Standard Oil Company, about 85 tons. I navigated with the schooner "Shasta." I had been in this channel before. I came into this one marked "C" with a big vessel lying outside. I went up in a small boat. It happened about once a year, in the fall and winter, right along every year since 1882. I did not at any of these times see any obstruction or levees across any of these bodies of water.

Cross-examination.

I never went up the stream "C" in a big boat in 1882. I would row up channel "C" about three miles from here (designating) 3 miles from the margin of the marsh land as shown on the map. Taking corners and everything into consideration, that channel is three miles. [80]

Testimony of Lewis Chamberlain, for Defendant.

LEWIS CHAMBERLAIN, being first duly sworn, as a witness for defendant and intervenor, testified as follows:

I reside in San Francisco. I am in the launch business. I own two boats. I went up the channel called "C" last April in a launch towing rock barges from the San Pablo Quarry here (pointing) to the Standard Oil Bulkhead. I made one trip in there before the dredger was in and one afterwards. The

(Testimony of Lewis Chamberlain.)

loaded barge drew five feet of water on both trips.

Cross-examination.

On both trips the tide was about four feet six. I had no difficulty getting up there either trip. I passed the dredger on the second trip where it lay about one-quarter of a mile from the Standard Oil Bulkhead. The barge in tow was about twenty-six feet wide and the dredger barge about thirty feet or more in width. I had no difficulty in passing the barge. I had no difficulty before I got into this waterway to reach the Standard Oil property except in the mud flats at beyond the end of the main slough. There was shallow water there. I probably got out of the channel. The wind was blowing strong and the boat small for that size of tow and the barge ran out of the channel and up on the mud flat. I am a mariner, licensed to navigate a launch. I do not know that water except by the chart. I have never had much experience there. I left the barge there one tide and went up into the slough and came back at the next turn of the tide and got the barge. I had no difficulty in navigating the slough except at one point where there was a little kind of bulkhead where a few boards were sticking up way up in here somewhere (indicating). It looked as though some obstruction had existed across the slough. [81]

Testimony of Charles H. Lind, for Defendant.

CHARLES H. LIND, being first duly sworn as a witness for defendant and intervenor, testified as follows:

(Testimony of Charles H. Lind.)

I live in Richmond. I am a photographer. I am familiar with the section of the country represented by map marked "Plaintiffs' Exhibit 10." I took photographs in the vicinity of that place in March, 1914. These photographs were taken at quite a high elevation south or west of the Standard Oil Asphalt plant, facing toward the channel. I took a series of photographs that day. These are the photographs marked Defendant's Exhibit "J." That vessel is the "Petroleum." I took the picture with the words "Ada McKewen" on. This vessel, at the time the picture was taken, was lying at anchor at the head of the channel, unloading rock there. On December 8th I took the photograph showing in the foreground Colonel Rees's boat "Suisun." These pictures correctly represent conditions there.

Cross-examination.

At the time I took these pictures, on the 7th or 8th of March, 1914, it was pretty close to high tide, and represents a series of pictures showing the "Petroleum" coming up.

Testimony of W. Lindsey, for Defendant.

W. LINDSEY, being first duly sworn, as a witness for defendant and intervenor, testified as follows:

I reside in Richmond. I am a police judge and have lived in the vicinity of Richmond for thirty-three years, and am familiar with the locality shown on the map marked "Plaintiffs' Exhibit 10," and the various waterways and channels there shown on the map marked "Plaintiffs' Exhibit 10." I have

(Testimony of W. Lindsey.)

sailed and fished and hunted over these bodies of water in the locality and have been familiar with the locality as far back as forty years. There formerly was a levee, or the [82] marks of one that ran by the main channel, put in by somebody—I think it was Mr. Tewksbury—in early days. It came to the creeks and stopped and then went on again on the other side, on up the main channel. About sixteen years ago we rented a place for shooting and fishing and undertook to close that main slough and run dykes over across to Mr. Pierce's land, across to where the belt line is. We tried to put a solid dyke across the slough marked "C" on the map. We towed up with a gasoline boat and barge loaded with piles, and a pile-driver. We only cut off the channel for about forty-eight hours, when a heavy flood came in and broke over the dykes, or levees, that we built and the water got inside and broke our piles. We tried it a second time and failed again. I know of the existence of no other dykes except those across channel "C," other than the remains of the dyke close to the mouth of channel "C" where it is connected with the main slough. All this marsh is covered at what we call mid tide, that is, a small tide. It comes to the top of the land, but at high tide it covers the salt rice grass which grows about four feet high there. Channel "C" was great for fishing because the water there always had a depth of four or five feet at extreme high tide. I never saw cattle grazing along the channel "C." I

(Testimony of W. Lindsey.)

saw cattle toward the east feeding at times, only a short ways. This used to be the main channel where the freight warehouses all used to be in early days, but is all built up now. That is, the channel east of channel "B."

Cross-examination.

When we attempted to put in this dam, only fishing and hunting boats traveled on the slough. We took that slough particularly because it was deeper water. The dyke which we attempted to build was north of the Standard Oil Company's [83] holdings, near the Pierce land. Portions of it are still to be seen. We tried to enclose the upper portion of the stream for shooting purposes. According to the map the dyke appears to be at the head of the slough, but it is not. At that time the channel at "C" was not as wide above the Standard Oil property as down below, but navigable for small boats. The dyke was between three hundred and four hundred feet from where the dredger was lying.

Testimony of E. J. Garrard, for Defendant.

E. J. GARRARD, being first duly sworn as a witness for defendant and intervenor, testified as follows:

I reside at Richmond, and have for 14 years past. I am mayor of the city of Richmond, and was a member of the city council of Richmond for the past 10 years. I am assistant engineer of the Standard Oil Company. I am familiar with the lands shown on the map "Plaintiffs' Exhibit 10," and also the channel "C." The black line represents the present

(Testimony of E. J. Garrard.)

properties of the Standard Oil Company. On March 9th, 1914, I saw the vessel "Ada McKewen" come up this channel at ordinary high tide. The land in the vicinity of channel "C" is about all covered. The grass sticks through the water. At low tide the land is bare water except in the sloughs and the creeks, as shown on the map. There are more or less distinct creeks. There is a public road at the head of this channel, known as Standard Avenue, formerly Road 26. It is forty feet wide and ends at the line of the Standard Oil Company.

Cross-examination.

The north line of the Standard Oil property cuts Road 26. The town of Richmond is north of the Santa Fe track. Point Richmond runs both south and north of the Santa Fe. There are people living a half mile to the south from the Santa Fe tracks, [84] that is as far as the settled portion runs. It runs south about 5 miles to the county line; nobody lives on the shaded portion. Standard Avenue, at the point where the Standard Oil property comes on the north, is about one-quarter of a mile east from the slough "C."

Testimony of J. T. Carnahan, for Defendant.

J. T. CARNAHAN, being first duly sworn as a witness for defendant and intervenor, testified as follows:

I reside in Richmond. I am a transitman employed by the Richmond City Engineer. I made a preliminary survey of the channel marked "C," in

(Testimony of J. T. Carnahan.)

November, 1914, to plan the proposed dredging work. I found elevations at the bottom of the slough across at various points to make an estimate of the materials to be dredged. We took different elevations on the bottom of the slough with reference to the city base. Mr. Martin, from my notes which I took at the time, worked up the figures in the office for the plans and estimates. We took cross sections approximately every 30 feet. This map represents channel "C." The red line is the traverse line which I ran along the slough. The black line on the outer edge of the blue represents the shore line, or bank of the slough. The green lines on either side represent the bottom of the slope of the dredged bank. The yellow portion shows the part that is dredged. The dredged portion was to be 80 feet on the bottom and the length of the channel to be dredged was between 5,500 and 5,600 feet. The land is all within the city of Richmond. The map was admitted in evidence for the purpose of illustration.

Cross-examination.

I do not remember a dyke—I remember some timbering posts in the slough, but made no note of it. The brown line represents the zero line according to the city base. The idea was to get the elevation of the bottom of the channel, not the depth of [85] the water, in order to estimate the material to be dredged. The elevation of the bottom would give the depth of water too, but the depth is not shown on the map.

Testimony of C. B. Martin, for Defendant.

C. B. MARTIN, being first duly sworn as a witness for defendant and intervenor, testified as follows:

I reside in Richmond. I am a draughtsman in the city engineer's office. I drew this map myself, marked Defendant's Exhibit "M," from notes produced by Mr. Carnahan. This map shows the course, direction, and width of bank, width of channel and proposed excavated portion of channel "C." The black lines at the southerly end of the map indicate the portion of the platted description of a deed between Mrs. Emily Tewksbury and the Richmond Belt Railway. A narrow strip running eastward for a mile across the marsh to the higher land and the portion crossing the channel is indicated on this map. The yellow portion indicates a width of 80 feet of the channel proposed to be excavated to the San Pablo Canal, according to cross-sections shown here. The outer black lines indicate the top of the bank of the channel. The maximum and minimum width varies from 100 feet to 200 feet. The dotted lines across the channel indicate where the cross-sections of the channel were taken. The cross-sections indicate the line of the bottom of the channel with reference to a level line at the top giving the height. The brown line which follows the whole course of the channel indicates the nought nought line or zero line or the base line from which all elevations are taken; that forms a contour which follows around the whole channel, both sides. The lines enclosing the yellow

(Testimony of C. B. Martin.)

strip are the actual width of 80 feet which it was proposed to dredge out. The lines at these angle points indicate the points where cross-sections were taken. I also marked in pencil [86] "place of old dyke"—I did not have the actual measurement, but it is about 300 feet to where this old dyke was built across at the north end. The figures along this red line give the distance and course by which they were located with reference to the section lines. These different course and directions are indicated on the map by sections, which means a distance of 100 feet, or a station. It is indicated on this line by stations. A station of 56 plus 91 means 5,611 feet from the point of beginning. The map was admitted in evidence for the purpose of illustrating the witness' testimony, and marked Defendant's Exhibit "M." This nought nought line begins at the south end of the channel on the Standard Oil dyke. The black line shows the ground line as it existed at that time—it represents the bottom of the slough. The red line shows the portion proposed to dig out. At the time the dredger stopped work it was about eight or nine hundred feet below the Standard Oil dyke. It was opposite cross-section 948. They had dredged from zero to a distance of 942 feet, starting at the upper or south end of the Standard Oil Dyke, and worked out toward the bay.

This cross-section was introduced in evidence for the purpose of illustration.

Cross-examination.

The platting of the cross-section lines just testi-

(Testimony of C. B. Martin.)

fied to was made merely as a draftsman and based upon figures furnished by Mr. Carnahan.

It was stipulated between counsel for plaintiffs and for defendant that the work of dredging was confined to the contract and plans and specifications, and that defendant has not and does not intend to dredge or do anything other than in accordance with said contract or the plans and specifications. [87]

Testimony of C. Anderson, for Defendant.

C. ANDERSON, being first duly sworn as a witness for defendant and intervenor, testified as follows:

I am captain of the dredge that was going to do the dredging. I took the barge up the channel marked as channel "C" on the map marked "Plaintiffs' Exhibit 10." The barge with the spuds and everything high up draws about 4½ feet of water. The dredge is about 30 feet wide and 74 feet long. I took the dredge up to about 400 feet from the Standard Oil dyke.

Cross-examination.

I did not go up to the dyke because I wanted to start dredging that way so as to lay my pipe and save the work, and turn around on the same pipe. I went up at flood tide. It took about an hour from the outside of San Pablo Canal. I started from Oakland in the morning and got up on the flats outside of San Pablo Canal in the evening. It was dark and low tide. I stayed there until flood tide and then pulled her in with the launch. When the tide

(Testimony of C. Anderson.)

was very low the dredger was on the bottom of the slough. I dredged about eight or nine hundred feet of this channel when stopped. I took out about 22,000 cubic yards of dredging, according to my estimate. There was about two or three feet of water in the channel where the dredging was stopped at low tide.

**Testimony of J. T. Carnahan, for Defendant
(Recalled).**

J. T. CARNAHAN, recalled for the defendant and intervenor, testified as follows:

The cross-sections testified to by Mr. Martin are drawn to scale. I have the original field-notes which indicate the distance from the red line shown on the plans at which these elevations are taken and show the distance above the zero line from which the depth of water could easily be computed. Without the aid of these notes, from the scaling the depth of water could be computed. [88]

Testimony of C. B. Martin, for Defendant (Recalled).

C. B. MARTIN, recalled for the defendant and intervenor, testified as follows:

The cross-section is drawn to a scale of 10 feet to the inch.

A copy of the permit from the Secretary of War to the city of Richmond to do the work of dredging in the south channel of San Pablo Canal, designated on Plaintiffs' Exhibit 10 as "C," was admitted in evidence, and marked Defendant's Exhibit "E."

Defendant then called the Court's attention to the

(Testimony of C. B. Martin.)

provisions of the charter of the city of Richmond and to the channel lines and Constitution of the State of California, of which the Court took judicial notice. Thereupon the case was submitted to the Court for decision. During the trial of the cause the Court, by consent and in company of counsel, made a personal view and inspection of the property involved in the cause, and of the premises, and of the slough marked "C" in Exhibit 10;

WHEREFORE, defendant and intervenor present the foregoing statement of the evidence produced at the hearing of said case, and pray that the same may be approved by the said Court as their statement of their case in order that the matters therein appearing may be of record in said action.

EARL D. WHITE,

Solicitor for Defendant.

D. J. HALL,

Solicitor for Intervenor.

The above and foregoing statement may be settled and allowed, November 21, 1916.

J. K. JOHNSON,

Solicitor for Plaintiffs.

The foregoing statement of the case is hereby settled, allowed and approved this 22d day of November, 1916.

WM. C. VAN FLEET,

District Judge.

[Endorsed]: Filed Nov. 22, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [89]

[Title of Court and Cause.]

Assignment of Errors.

NOW COMES North American Dredging Company of Nevada, a corporation, defendant in the above-entitled cause, and city of Richmond, a municipal corporation, intervenor in said cause, and specify and assign the following as errors upon which they will rely upon their appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an interlocutory decree entered in the above-entitled cause in the above-named court on the first day of September, 1916, granting an injunction enjoining and restraining the defendant North American Dredging Company of Nevada, a corporation, and intervenor, city of Richmond, a municipal corporation, and their and each of their officers, agents, servants, employees and attorneys from cutting, dredging or excavating any ditch or canal or carrying away the dirt or soil upon the property of the plaintiffs and described in the Amended Bill of Complaint of plaintiffs on file herein, and order and reference to the Master in Chancery for the purpose of ascertaining and reporting to the said court the loss and damage sustained by the said plaintiffs through the acts of said defendant and said intervenor, which said order was rendered and entered in the said District Court on the 1st day of September, 1916, as set forth in said interlocutory decree.

THAT said District Court of the United States in and for the Northern District of California, Second Division, erred as follows:

I.

In adjudging and decreeing that defendant and intervenor and their officers, agents, servants, employees and attorneys be enjoined from cutting, dredging or excavating any ditch or canal, [90] or carrying away the dirt or soil upon the property of the plaintiffs and described in the Amended Bill of Complaint of plaintiffs herein.

II.

In ordering that an accounting of the loss and damage suffered by plaintiffs by reason of the acts of defendant and intervenor be referred to the Master in Chancery to hear testimony as to such loss and damage and to take an accounting thereof and to report the same together with his findings thereon to the Court.

III.

In adjudging that plaintiffs have and recover their costs and disbursements in this suit.

IV.

In overruling and not sustaining defendant's and intervenor's objection to the admission in evidence of a certain agreement between the city of Richmond, intervenor, and the Standard Oil Company, a corporation, dated March 30, 1915, wherein the city of Richmond agrees for the consideration of \$.1074 a cubic yard to deposit all material dredged from the lands described in plaintiffs' Amended Bill on the lands of the Standard Oil Company.

V.

In sustaining and not overruling plaintiffs' objection to the following question asked by defendant

and intervenor to defendant's and intervenor's witness, H. E. Aine, as follows: Question: Are there any other bulkheads constructed where that dredging material could be placed so that it could not run back into the channel? Said objection being sustained upon the ground that the question was immaterial, irrelevant and incompetent, and to which question said witness would have testified that the bulkhead upon the property of the Standard Oil Company was the only bulkhead behind which said dredging material could be placed. [91]

In order that the foregoing Assignment of Errors may be and appear of record the defendant and intervenor present the same to the Court and pray that such disposition may be made thereof as is in accordance with the laws of the United States made and provided.

WHEREFORE said defendant and intervenor pray that said interlocutory decree of September 1st, 1916, in said cause against the defendant and intervenor be reversed and that the Southern Division of the United States District Court, Northern District of California, Second Division, be directed to enter an order setting aside the said decree and that the defendant and intervenor have and recover of plaintiffs their costs and disbursements herein.

All of which is respectfully submitted.

EARL D. WHITE,
Solicitor for Defendant.

D. J. HALL,
Solicitor for Intervenor.

[Endorsed]: Filed Sep. 29, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [92]

[Title of Court and Cause.]

Petition for Order Allowing an Appeal.

North American Dredging Company of Nevada, a corporation, defendant above named, and city of Richmond, a municipal corporation, intervenor above named, conceiving themselves aggrieved by the interlocutory decree made and entered in the above-entitled cause in the above-named court on the first day of September, 1916, wherein and whereby it was **ORDERED, ADJUDGED AND DECREED** that the defendant, North American Dredging Company of Nevada, a corporation, and the intervenor, city of Richmond, a municipal corporation, and their and each of their officers, agents, servants, employees and attorneys be enjoined from cutting, dredging or excavating any ditch or canal, or carrying away the dirt or soil upon the property of the plaintiffs and described in said amended Bill of Complaint of plaintiffs on file, and wherein and whereby it was decreed that an accounting of the loss and damage suffered by plaintiffs, by reason of the acts of defendant and intervenor, be referred to the Master in Chancery of this court to ascertain and report an accounting to this Court of the loss and damage suffered by plaintiffs herein.

HEREBY petition said Court for an order allowing said defendant and said intervenor to prosecute an appeal from said interlocutory decree granting

said injunction and order an accounting of the loss and damage suffered by plaintiffs by reason of the acts of defendant and intervenor referred to in said interlocutory decree, to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided. Also that an order be made fixing the amount of security which the said defendant and the said intervenor shall give and furnish upon such [93] appeal.

And your petitioners will ever pray.

EARL D. WHITE,
Solicitor for Defendant.
D. J. HALL,
Solicitor for Intervenor.

[Endorsed]: Filed Sep. 29, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [94]

[Title of Court and Cause.]

Order Allowing Appeal.

Upon motion of Earl D. White, Esq., solicitor for defendant, and D. J. Hall, Esq., solicitor for intervenor, and on filing the petition of defendant and intervenor, and the Assignment of Errors,

IT IS ORDERED that an appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit, from the interlocutory decree made and entered on the 1st day of September, 1916, granting an injunction against defendant and intervenor herein and from an order of reference

to the Master in Chancery for the ascertainment and report of the damage sustained by plaintiffs.

AND IT IS FURTHER ORDERED that the amount of defendant's and intervenor's bond be and the same is hereby fixed at the sum of three thousand dollars (\$3000), the same to act as bond for costs on appeal, and that until the determination of the appeal herein, all further proceedings in the court below be stayed.

IT IS FURTHER ORDERED that a certified transcript of the record and proceedings be forthwith transmitted to the said United States Court of Appeals.

WM. C. VAN FLEET,
District Judge.

[Endorsed]: Filed Sep. 30, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [95]
31984-16.

[Title of Court and Cause.]

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Lucio M. Mintzer and Mauricia T. Mintzer, as executor and executrix of the last will and testament of William Mintzer, deceased, plaintiffs in the above-entitled action, in the full and just sum of three thousand dollars (\$3000), to be paid to the

said plaintiffs, their heirs and assigns, for which payment, well and truly to be made, the said United States Fidelity and Guaranty Company binds itself, its successors, and assigns firmly by these presents.

Sealed with the corporate seal and dated this 30th day of September, 1916.

The condition of the above obligation is such that whereas defendant and intervenor above named have taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse an order made and entered on the 1st day of September, 1916, by the District Court of the United States, in and for the Northern District of California, Second Division, in the above-entitled cause, granting an injunction restraining the defendant and intervenor and their officers, agents, servants, employees, and attorneys from cutting, dredging or excavating any ditch or canal, or carrying away the dirt or soil upon the property of the plaintiffs and described in plaintiffs' amended bill of complaint on file herein, and order of reference to the Master in Chancery for the purpose of ascertaining and reporting to the said Court the loss and damage sustained by plaintiffs through the acts of [96] defendant and intervenor.

NOW THEREFORE, the condition of the above obligation is such that if defendant and intervenor, above named, shall prosecute their said appeal to effect, and answer all costs and damages if they fail to make good their appeal, then this obligation shall

be void; otherwise to remain in full force and effect.

[Seal] UNITED STATES FIDELITY AND
GUARANTY COMPANY.

By BRADLEY CARR,
Attorney in Fact.

By H. V. D. JOHNS,
Attorney in Fact.

State of California,

City and County of San Francisco,—ss.

On this 30th day of September in the year one thousand nine hundred and 16, before me M. J. Cleveland, a notary public in and for the city and county of San Francisco, personally appeared H. V. D. Johns and Bradley Carr, known to me to be the persons whose names are subscribed to the within instrument as the attorneys in fact of the United States Fidelity and Guaranty Company, and acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and their own names as attorneys in fact.

[Seal] M. J. CLEVELAND,
Notary Public in and for the City and County of San
Francisco, State of California.

Approved September 30, 1916.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Sep. 30, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [97]

[Title of Court and Cause.]

Praeceptum for Transcript of Record.

To the Clerk of said Court:

The above-entitled court having rendered in the above-entitled cause an interlocutory decree on the first day of September, 1916, and the said North American Dredging Company of Nevada, a corporation, defendant above named, and the city of Richmond, a municipal corporation, intervenor above named, having appealed from said decree to the United States Circuit Court of Appeals, Ninth Circuit,

You are hereby requested to make up as and for the record to be issued in and upon the said appeal the following:

Amended Bill of Complaint for injunction and damages.

Answer of defendant North American Dredging Company of Nevada.

Bill in intervention of city of Richmond, intervenor.

Answer of plaintiffs to Bill in Intervention.

Subpoena ad Respondendum.

Opinion of Court.

Interlocutory decree granting injunction and ordering reference to Master in Chancery for ascertainment of loss and damages.

Petition for order allowing appeal.

Assignment of Errors.

Order Allowing Appeal.

Undertaking on Appeal.

Citation.

A statement of the evidence introduced by and on behalf of the respective parties upon the trial in the above-entitled court of the above-entitled action with the documentary evidence and exhibits offered and received in evidence in the above-entitled [98] cause.

EARL D. WHITE,
Attorney for Defendant.

D. J. HALL,
Attorney for Intervenor.

Receipt of copy of the above Praecept is hereby admitted this 3d day of October, 1916.

J. K. JOHNSON,
Solicitor for Plaintiffs.

[Endorsed]: Filed Oct. 3, 1916. Walter B. Maling,
Clerk. [99]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 184—EQUITY.

LUCIO M. MINTZER et al., etc.,

Plaintiffs,

vs.

NORTH AMERICAN DREDGING COMPANY OF
NEVADA, a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing ninety-nine (99) pages, numbered from 1 to 99, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$60; that said amount was paid by defendant; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the *said* of said District Court this 3d day of January, A. D. 1916.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [100]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Lucio M. Mintzer, and Mauricia T. Mintzer, as Executor and Executrix of the Last Will and Testament of William Mintzer, Deceased, GREETING:
You are hereby cited and admonished to be and

appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the Southern Division of the United States District Court for the Northern District of California, Second Division, wherein North American Dredging Company of Nevada, a corporation, and City of Richmond, a municipal corporation, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 30th day of September, A. D. 1916.

WM. C. VAN FLEET,
United States District Judge.

Receipt of a copy thereof is hereby admitted this 3d day of October, 1916.

J. K. JOHNSON,
Solicitor for Plaintiffs and Appellees.

[Endorsed]: No. 184—In Equity. In the Southern Division of the United States District Court for the Northern District of California, Second Division. North American Dredging Company of Nevada et al., Appellants, vs. Lucio M. Mintzer and Mauricia T. Mintzer, etc., Appellees. Citation on Appeal. Filed Oct. 3, 1916. Walter B. Maling, Clerk. [101]

[Endorsed]: No. 2913. United States Circuit Court of Appeals for the Ninth Circuit. North American Dredging Company of Nevada, a Corporation, and City of Richmond, a Municipal Corporation, Appellees, vs. Lucio M. Mintzer and Mauricia T. Mintzer, as Executor and Executrix of the Last Will and Testament of William Mintzer, Deceased, Appellees. Transcript of the Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed January 5, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

NORTH AMERICAN DREDGING COMPANY OF
NEVADA, a Corporation, and CITY OF
RICHMOND, a Municipal Corporation,
Appellants,

VS.

LUCIO M. MINTZER and MAURICIA T. MINTZER,
as Executor, etc.

**Order Extending Time to and Including November
30, 1916, to File Record and Docket Cause.**

Good cause appearing therefor, it is hereby or-

dered that the appellants may have to and including November 30, 1916, in which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 30, 1916.

WM. W. MORROW,
Judge, United States Circuit Court of Appeals,
Ninth Judicial Circuit.

[Endorsed]: Order Under Rule 16 Enlarging Time to Nov. 30, 1916, to File Record Thereof and to Docket Case. Filed Oct. 30, 1916. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

NORTH AMERICAN DREDGING COMPANY OF
NEVADA, a Corporation, and CITY OF
RICHMOND, a Municipal Corporation,
Appellants,

vs.

LUCIO M. MINTZER and MAURICIA T. MINTZER, as Executor and Executrix of the Last Will and Testament of WILLIAM MINTZER, Deceased,

Appellees.

Order Extending Time to and Including December 30, 1916, to File Record and Docket Cause.

Good cause appearing therefor, it is hereby ordered that the appellants may have to and including December 30, 1916, in which to file the record and

docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, November 29, 1916.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to — to File Record Thereof and to Docket Case. Filed Nov. 29, 1916. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

NORTH AMERICAN DREDGING COMPANY OF
NEVADA, a Corporation, and CITY OF
RICHMOND, a Municipal Corporation,
Appellants,

vs.

LUCIO M. MINTZER and MAURICIA T. MINTZER, as Executor, etc.,

Appellees.

Order Extending Time to and Including January 5, 1917, to File Record and Docket Cause.

Good cause appearing therefor, IT IS HEREBY ORDERED that the appellants may have to and including January 5, 1917, in which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

WM. C. VAN FLEET,
United States District Judge.

December 29, 1916.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to January 5, 1917, to File Record Thereof and to Docket Case. Filed Dec. 29, 1916. F. D. Monckton, Clerk.

No. 2913. United States Circuit Court of Appeals for the Ninth Circuit. Three Orders Under Rule 16 Enlarging Time to January 5th, 1917, to File Record Thereof and to Docket Case. Refiled Jan. 5, 1917. F. D. Monckton, Clerk.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NORTH AMERICAN DREDGING
COMPANY OF NEVADA, a Cor-
poration, and CITY OF RICH-
MOND, a Municipal Corporation,
Appellants,

vs.

LUCIO M. MINTZER and MAU-
RICIA T. MINTZER, as Executor
and Executrix of the Last Will and
Testament of WILLIAM MINTZ-
ER, Deceased,

Appellees.

BRIEF FOR APPELLANTS.

UPON APPEAL FROM THE SOUTHERN DIVISION OF THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA,
SECOND DIVISION.

Filed

FEB 23 1917

EARL D. WHITE,

D. J. HALL,

F. D. Monckton,

Attorneys for Appellants.

No. 2913

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NORTH AMERICAN DREDGING
COMPANY OF NEVADA, a Cor-
poration, and CITY OF RICH-
MOND, a Municipal Corporation,
Appellants,

vs.

LUCIO M. MINTZER and MAU-
RICIA T. MINTZER, as Executor
and Executrix of the Last Will and
Testament of WILLIAM MINTZ-
ER, Deceased,
Appellees.

BRIEF FOR APPELLANTS

GENERAL EXPLANATION.

This appeal is from a judgment rendered in the District Court of the United States for the Northern District of California, Second Division, in favor of the plaintiffs (appellees herein).

The nature of the action and the issues involved are so clearly set forth in the opinion directing

entry of decree in favor of Plaintiffs, commencing on page fifty-five of the Transcript of Record, that we quote therefrom as follows:

“This is a bill to enjoin the defendant from further proceeding to dredge out and deepen a certain waterway or channel traversing lands alleged to belong to the plaintiffs’ testator, and from carrying away the earth or soil therefrom, as constituting a wilful and malicious trespass and waste, and to recover damages for the waste and injury already done.

The answer of the defendant denies any ownership or right of any kind in the plaintiffs in the land involved, and sets up that the channel in question is ‘known and designated as the South Channel of the San Pablo Canal, all within the city limits of the City of Richmond, County of Contra Costa, State of California, and that said channel is and has been for many years last past, a navigable waterway, with a public terminus, connecting the said city of Richmond with the San Pablo Bay and the bay of San Francisco’; and that ‘for many years last past vessels engaged in commerce have navigated and traversed said channel’; that all the acts done and committed by defendant of which complaint is made have been had and done under and in pursuance of a contract theretofore entered into between defendant and said city of Richmond whereby ‘defendant agreed to dredge a channel eighty (80) feet wide, in and through said south channel of said San Pablo Canal, to a uniform depth of

eight (8) feet below low tide,' and that the work of dredging said channel was being done by defendant 'for the purpose of improving said waterway in the interest of commerce and navigation,' etc. It denies that plaintiffs have suffered any damage or that defendant 'has committed any wilful or malicious or any trespass upon any property of plaintiffs.' It then alleges, as ground of affirmative relief, that after defendant had removed approximately 22,000 cubic yards of material from said channel it was stopped by the injunction issued herein and has since discontinued work under said contract, and that by reason of such interruption and delay in its work defendant has suffered damages on its part for which it asks judgment against the plaintiffs.

The city of Richmond was permitted to file a bill of intervention in which it alleges that the channel in question is a natural arm of San Pablo Bay, which is a navigable body of water within the State; 'that the depth of water in said channel varies with the rise and fall of the tide, and that at ordinary low tide said channel has a minimum depth of two (2) feet, and at ordinary high tide has a minimum depth of eight (8) feet'; and after alleging substantially in the terms set up in the answer the navigation of said channel during recent years between other points and the city of Richmond, it is alleged that in order to improve the navigability of the channel and render it more suitable for commerce 'it became and is necessary to deepen said channel throughout its entire length and to a width

of eighty (80) feet, to a depth of eight (8) feet at ordinary low tide.' It is alleged 'that the city of Richmond has a population of 20,000 or upwards, and contains within its limits a large number of extensive manufacturing plants and industries; that it is essential for the best interests of the city of Richmond, its inhabitants and the public generally, that the navigability of said channel be improved and increased as aforesaid, thereby affording better transportation facilities for the city of Richmond, its inhabitants and the public generally.' It admits the entering into the contract as set up by defendant for the deepening and widening of the channel, and alleges that it has procured for that purpose a permit from the War Department of the United States for such improvement. It denies any right or title in plaintiffs in or to the premises involved, or that any soil or other thing of value is being taken from plaintiff's property.

In response to the bill of intervention the plaintiffs filed an answer denying all its allegations as to the navigability or commercial value of said channel, and alleging that the intervenor and the Standard Oil Company of California have entered into a contract 'whereby it was agreed that the city of Richmond should cause the dirt or soil dredged or taken from the property of plaintiffs to be deposited upon the property of the Standard Oil Company of California, and that it should pay to the city of Richmond ten and 74/100 cents per cubic yard therefor, that being the exact price that the city of Richmond agreed to pay the defendant

herein, North American Dredging Company of Nevada for dredging said alleged channel as aforesaid, and that the aim and purpose of said agreement between the Standard Oil Company and the city of Richmond was that the Standard Oil Company should pay for said dredging, and thereby receive and obtain the property of plaintiffs without paying them therefor.' And it is alleged that if said channel is deepened in accordance with the contract between the intervenor and the defendant 'it will enable the Standard Oil Company of California to obtain a waterway to the San Pablo Bay over and across and upon the land and property of plaintiffs.' "

STATEMENT OF THE EVIDENCE.

The channel in question, referred to in the pleadings as the "South Channel of the San Pablo Canal" is referred to and designated in the evidence and the exhibits introduced as Channel "C." This channel is entirely within the corporate limits of the City of Richmond. (Tr. page 101).

This channel extends from San Pablo Creek (or Canal) through appellees' land and beyond the property of the Richmond Belt Line Railroad to the property of the Standard Oil Company. (Tr. page 76).

This channel terminates at the San Pablo Canal, which canal extends to San Pablo Bay. (Tr. pages 85 and 86).

It varies in width from one hundred (100) feet to two hundred (200) feet. (Tr. page 86).

The lands of the appellees, through which Channel C extends comprise about six hundred and eighty-seven (687) acres of swamp and overflowed lands, salt marsh and tide lands. (Tr. page 18).

Before any dredging was done in Channel "C", it had a depth of water at low tide varying from four (4) feet in the shallowest place, at the Standard Oil levy, to sixteen (16) feet at the entrance of the mouth of the channel. Midway of the channel between the Standard Oil refinery and the mouth of the channel there was in the neighborhood of about eight (8) feet of water at low tide. (Tr. pages 92 and 93). These figures are also verified by the Map in evidence marked defendants' Exhibit "M", which was made by the City Engineer of the City of Richmond, which shows the width, length and depth of the channel throughout.

On December 8, 1915, soundings taken at near flood tide, under the direction of Col. Thomas H. Rees, throughout the entire length of the channel, showed a variation of water in the channel from eleven (11) to sixteen (16) feet. The predicated tide in the tide tables for that tide was 6.8 feet. One sounding taken at a sharp point showed seven (7) feet of water, but this sounding was not shown to have been at the deepest portion of the channel. (Tr. p. 87).

An attempt was made about 1870 to construct a levee across Channel "C" and the San Pablo Canal (referred to in the proceedings in the trial Court as Channel "B"). The levee was a failure so far as Channel "B" was concerned. The levee could not restrain the water. The water was shut off completely in Channel "C" for one winter, the tide then took it out. (Tr. pages 77 and 78).

The evidence adduced as to the actual navigation of Channel "C" was as follows:

H. E. Aine testified that he had been familiar with Channel "C" and the lands through which it runs for the last twenty-six (26) or twenty-eight (28) years. (Tr. page 88). That the channel was navigated considerably with duck boats and flat boats. That in 1907, he piloted a launch which brought up through this channel several loads of piling which was delivered at the Standard Oil Company's property. That in 1914, he piloted up a barge and a gasoline launch and also the "Petroleum No. 3," a stern-wheeler. (Tr. page 89). That in 1914 the scow-schooner "Ada McKewen" brought a load of rock through Channel "C" to a point where the channel connects with the Standard Oil property. The channel had not been dredged out prior to the time these boats went up. (Tr. page 91).

In 1915, the craft known as the "Shasta" brought in through Channel "C" a cargo of sixty (60) yards of crushed rock. (Tr. page 92).

The "Ada McKewen" is a power scow boat, drawing about five (5) feet of water when loaded. The "Petroleum No. 3" is a stern-wheeler. (Page 93).

Fred Klesow testified that he is a master mariner in the bay and river trade. That he was first on the land through which Channel "C" runs about 1882, 1883 and 1884. That he navigated these streams with a vessel named the "Lookout" with a cargo of about fifty (50) tons, having about four (4) feet nine (9) inches draft. (Tr. page 94). That in December, 1915, he navigated Channel "C" with the schooner "Shasta" bringing up about eighty-five (85) tons of rock for the Standard Oil Company. That he never went up Channel "C" in a big boat in 1882. (Tr. page 95).

Lewis Chamberlain testified that he is in the launch business and owns two boats. That he went up Channel "C" in a launch towing rock barges to the Standard Oil Bulkhead. That he made one trip before the dredger of appellant, North American Dredging Company, was in and one afterwards. The loaded barge drew five feet of water on both trips. On both trips the tide was about four feet six inches. That the barge in tow was about twenty-six (26) feet wide. That he passed the dredger on the second trip. That the dredger barge was about thirty (30) feet or more in width. That he had no difficulty in passing it. That he had no difficulty in navigating Channel "C" except at one point where there was a kind of bulkhead where a few boards were sticking up. (Tr. pages 95 and 96).

W. Lindsey testified that he had lived in the vicinity of Richmond for thirty-three (33) years and is familiar with Channel "C" and the lands through which it runs. (Tr. page 97). That he has sailed, fished and hunted over the bodies of water in this locality as far back as forty (40) years. That about eighteen (18) years ago in an effort to make a levee and dike across Channel "C", he and others towed a barge, loaded with piles and a pile driver, by means of a gasoline boat, up Channel "C". Because the levee broke, they navigated the channel again and made a second attempt to build dikes and levees across Channel "C". (Tr. page 98).

C. Anderson, the captain of the dredger with which defendant was dredging the channel, testified that he took the dredge, which is thirty (30) feet wide, seventy-four (74) feet long and draws about four and one-half ($4\frac{1}{2}$) feet of water, up Channel "C" with a launch to about four hundred (400) feet from the Standard Oil Company's dike. (Tr. page 104).

Thomas H. Rees testified that he resided in San Francisco and that he was Lieutenant-Colonel, Corps of Engineers of the U. S. Army, in charge of the Government Engineers' office in San Francisco, and that he was in local charge of the improvement of the waterways around San Francisco Bay, and that he issued permits for improvements or works in navigable waters by authority of the Secretary of War. That he had seen the body of water marked "South Channel San Pablo Canal" referred to as

Channel "C", and that he issued the permit, under the authority of the Secretary of War, to the City of Richmond to do the work of dredging in the South Channel of San Pablo Canal, designated on Plaintiffs' exhibit 10 as Channel "C", which said permit was marked defendants' Exhibit "E". (Tr. pages 85 and 105).

Thomas H. Rees also testified that on December 8, 1915, he navigated Channel "C" with a power boat "The Suisun," being a boat about eighty-six (86) feet long, having a beam about sixteen (16) feet and drawing about five (5) feet nine (9) inches to six (6) feet of water. He also testified: "We went up just before high tide. The tide was still rising or flooding when we came out of the stream. While we were in the dredged channel a photograph was taken of my vessel." (Tr. page 85). The photograph exhibited to Colonel Rees was identified by him and introduced in evidence and marked defendant's Exhibit "A."

Thomas H. Rees further testified "we came into San Pablo Bay, into the mouth of San Pablo Canal, and then into the south channel of San Pablo Canal. (Channel "C"). The south channel of San Pablo Canal (Channel "C") is varying in width, some places not over 100 feet wide between the marsh land on either side and other places perhaps 200 feet or more." (Tr. page 86). He also testified that he had soundings taken as he came in and as he went out. That in the channel, they ran generally eleven (11) to twelve (12) feet of water, some-

times up to fifteen (15) or sixteen (16). At one point there was a sounding of seventeen (17) feet of water.

Colonel Rees also testified that he observed the land on either side of Channel "C," and that so far as he could see the immediate banks were covered with water. The salt marsh on either side so far as he could see was about a-wash. The water was just covering it generally. The grass was sticking up above the water. Some little distance away, it was impossible to tell whether the ground was above water or whether it was only the grass. He could see no evidence of any obstructions or dikes. (Tr. page 86).

Colonel Rees further testified that this channel is shown on the regular maps of the Coast and Geodetic Survey, but that the maps do not indicate whether or not it is navigable. (Tr. page 87).

Colonel Rees also testified that before issuing the permit hereinbefore referred to, which permit was signed by him on July 21, 1914, he received information from the City of Richmond concerning the navigability of the channel, and had been furnished with a description of the channel, and with a photograph showing a boat in the channel and at the head of the channel by the City Attorney of the City of Richmond. (Tr. page 88).

H. E. Aine testified: "Channel 'C' connects with the Standard Oil channel and runs to the main land.

The Standard Oil channel is a dredged channel going up to the Belt Line and it ends on a city street that comes behind the Standard Oil plant. By the Belt Line I mean the Richmond Belt Line Railway which begins at the Standard Oil Refinery and runs to Winhaven. It connects with both the Southern Pacific and the Santa Fe. It runs past the Standard Oil property around to Winhaven. This dredged channel connecting with Channel 'C' ends about 100 feet from the Richmond Belt Line Railway. The Richmond Belt Line Railway appears in that picture (Defendant's Exhibit 'C') in the foreground. This picture was taken on the 8th of December, the day of the visit of Colonel Rees. It correctly represents the condition of the land as to being covered with water at that time. I recognize the picture marked Defendant's Exhibit 'B.' I saw the picture taken. I observed the conditions in relation to the channel and the land there generally. The picture marked Plaintiffs' Exhibit 'D' is a correct representation of the condition existing at the time when Colonel Rees' boat came in there. I locate channel "C" on this picture. (Witness refers to Defendant's Exhibit 'D'). The channel shows very plainly in the picture. There is a boat in the channel." (Tr. page 91). "This dredged channel terminates near the asphalt department of the Standard Oil plant. Asphalt is handled in barrels, mostly over the Belt Line at this time. This channel 'C' could be used for any commercial purposes there." (Tr. page 93). "The Standard Oil plant was started in 1901." (Tr. page 93).

The City of Richmond was incorporated in 1905.
(Tr. page 79).

SPECIFICATION OF ERRORS.

The following assignment of errors by the trial Court are relied upon:

I.

In adjudging and decreeing that defendant and intervenor and their officers, agents, servants, employees and attorneys be enjoined from cutting, dredging or excavating any ditch or canal, or carrying away the dirt or soil upon the property of the plaintiffs and described in the Amended Bill of Complaint of plaintiffs herein.

II.

In ordering that an accounting of the loss and damage suffered by plaintiffs by reason of the acts of defendant and intervenor be referred to the Master in Chancery to hear testimony as to such loss and damage and to take an accounting thereof and to report the same together with his findings thereon to the Court.

III.

In adjudging that plaintiffs have and recover their costs and disbursements in this suit.

IV.

In overruling and not sustaining defendant's and

intervenor's objection to the admission in evidence of a certain agreement between the City of Richmond, intervenor, and the Standard Oil Company, a corporation, dated March 30, 1915, wherein the city of Richmond agrees for the consideration of \$.1074 a cubic yard to deposit all material dredged from the lands described in plaintiffs' Amended Bill on the lands of the Standard Oil Company.

V.

In sustaining and not overruling plaintiffs' objection to the following question asked by defendant and intervenor to defendant's and intervenor's witness, *H. E. Aine*, as follows: Question: Are there any other bulkheads constructed where that dredging material could be placed so that it could not run back into the channel? Said objection being sustained upon the ground that the question was immaterial, irrelevant and incompetent, and to which question said witness would have testified that the bulkhead upon the property of the Standard Oil Company was the only bulkhead behind which said dredging material could be placed.

ARGUMENT.

THE TRIAL COURT SHOULD NOT HAVE ENJOINED THE DREDGING OF THE CHANNEL BECAUSE IT IS A NAVIGABLE WATERWAY. The channel in question is navigable. Navigability in fact is the general test by which the navigability of waters is determined.

If they are navigable as a matter of fact, they are deemed navigable waters. If a stream is navigable in fact, it is navigable in law.

Kamm vs. Normand, 126 Am. State Rep. 698. See also—exhaustive note on subject “What Waters are Navigable” 126 Am. State Rep. 710-733.

“The capability of use by the public for purposes of transportation or commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact and becomes by law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal-power, by the wind, or by the use of steam, may be the instruments of such commerce, although in order to give it the character of a navigable stream it must be generally and actually useful for some purpose of trade or agriculture.”

United States vs. The Montello, 20 Wall 430.

In the case of the *City of Oakland vs. Oakland Water Front Company*, 118 Cal. 160 (180-2), the Court in referring to a branch of the stream, called San Antonio Creek, being a portion of the Oakland Estuary, says:

“Each branch had a depth of 2 ft. at low-tide—the same as the depth on the bar at the mouth of the Estuary, which meant a depth at full high-tide of from seven to eight feet every twenty-four hours, and this was sufficient to accommodate a very important traffic.”

And under this state of facts, the Court held that the branch of the Estuary above referred to was a navigable body of water.

The facts in the case at bar show a more favorable condition of navigability than those existing in the Oakland Water Front case.

A channel in a tide-river, which at half-tide is navigable for rowboats, is a navigable channel, although at low-tide there is not much water therein.

Judson vs. Tidewater Lumber Co., 98 Pac. 377.

A slough emptying into the sea at and during the ebb and flow of the tide, navigable for scows and for rafting and booming of logs, is a navigable stream.

Dawson vs. McMillan, 75 Pac. 807.

The navigability of a stream does not depend upon the extent or the manner of the use made of it, but whether or not it is capable of being used for purposes of trade and travel in the usual and ordinary modes.

State vs. Eason, 114 North Carolina, 787; 19 SE. 88.

The Daniel Ball, 10 Wall 557.

The Montello, 11 Wall. 411; 20 Wall. 430.

“The true test in determining the right of the public in the use of a stream is whether or

not inherently and in its nature it is capable of being used for floatage. If it is, an easement in favor of the public exists, whether it has been used by the public or not."

Kinney on Irrigation and Water Rights, 568.

Moore vs. Sanborn, 59 Am. Dec. 209.

Brown vs. Chadbourne, 50 Am. Dec. 641.

Willow River Co. vs. Wade, 42 L. R. A., 305.

The character of navigability is not so much determined by the frequency of its use for navigation as it is by its capacity of being used for purposes of transportation and commerce. Capacity for transportation and not the extent of the use for transportation is the criterion. The waters need not be in actual use if capable of the use.

St. Louis Railway Co. vs. Ramsey, 53 Ark. 314.

Sullivan vs. Spottswood, 82 Ala. 163.

Commonwealth vs. Inhabitants of Charlestown, 1 Pick. 180.

Nor does the fact that a floatable stream is not used by the public generally, but only by persons having a particular occupation, deprive it of its public character, if it has the capacity for useful navigation.

"In order for a stream to be determined navigable it is not necessary for it to be capable of navigation continuously throughout all the seasons, if it is so capable during a material portion of the year. It is the valuable, and not the continued use which is the important element to navigability."

Bucki vs. Cone, 25 Fla. 1, 6 So. 160.

“The navigability of a stream is shown where it appears that for a great many years previously boats navigated it at certain seasons of the year, when there is no evidence that its condition has changed.”

Miller & Lux vs. Enterprise Canal Co., 142 Cal. 208.

The facts of the case at bar show that channel “C” is in fact navigable throughout its entire length from the San Pablo Canal to the property of the Standard Oil Company. Between the property claimed by the plaintiffs and the property of the Standard Oil Company is the property of the Richmond Belt Line Railway Company, a railway corporation which is a public carrier and a public service corporation. The contention of the plaintiffs that this channel is entirely surrounded by their land, or by land claimed by them, is not supported by the evidence, as the land of the Standard Oil Company, the Richmond Belt Line Railway, and the lands claimed by the plaintiffs are all adjacent to the natural banks of this channel. Shippers may have cargoes transported through this channel and transported to the cars of the Richmond Belt Line Railway without trespassing upon the private property of the Standard Oil Company, or upon the private property claimed by the plaintiffs. Even if this were not a fact, the navigability of the channel is not affected by the question whether one riparian owner has a monopoly of the surrounding land.

State vs. Twiford, 136 No. Carolina 603; 43 SE. 586.

If this were not the rule the question as to the navigability of water would depend upon whether or not riparian owners had monopolized the ownership of the adjacent soil.

In the case of *Chisolm vs. Caines*, 67 Fed. Rep 285, the Court, in considering the question of navigability of waters, discussed the essential characteristics of a navigable stream as follows:

“The crucial question in this case therefore is: are these creeks, or any of them . . . those which bound and those which permeate these marshes, . . . public navigable streams, or capable of becoming navigable streams; if they are, although they may have passed with the marshes which surround them, they are held subject to the uses of the public for passage and navigation.” . . .

“Nor does it (navigability) depend upon uninterrupted use, nor upon a channel free from obstruction, if this can be removed.”

- “Nor is it necessary that it shall at all times be passable . . . floatable.” . . .

“The essential characteristic of a navigable stream is that it is, or is capable of becoming, a public highway . . . a means open to the public of passing from one place where they have a right to be to another in which they have the same right.” . . .

“If a stream in itself, or in connection with others, forms a continuous connection in whole or in part between different places in different states, it is navigable water of the United

States; but if it lies wholly within a state and is only navigable between different places within a state, then it is not navigable waters of the United States, but only a navigable water of a state. This distinction simply determines the jurisdiction over it. The essential to navigability is the same in both, . . . a highway between places." (p. 292).

In *Attorney General vs. Woods*, 108 Mass. 436, 439, the Supreme Court made the test of navigability neither the size of the streams nor the character of the vessels on them, nor the motive of the public in using them, *but the fact that they were highways through which the public could pass for business or pleasure.*

According to the overwhelming weight of authority, the navigability of a stream or other body of water depends, not upon the use which has been made of the stream, but upon its capability of use in the furtherance of navigation and commerce.

Prior to 1901, this channel had been navigated by duck boats and flat boats, (Tr. page 89) according to the testimony of H. E. Aine. And on at least two occasions, in about the year 1900, the channel had been navigated with a gasoline launch towing a barge and pile driver, according to the testimony of W. Lindsey (Tr. page 98).

Prior to the location of the Standard Oil plant in 1901 and prior to the incorporation of the City of Richmond in 1905, there had been little occasion to make any extensive use of this waterway for

commercial purposes, but the testimony shows that it was capable of such use.

After the location of the Standard Oil plant and the incorporation of the City of Richmond, and the subsequent growth and development of said City, the use and necessity for use of this waterway has correspondingly increased.

According to the testimony of H. E. Aine a launch navigated this channel and towed several barge loads of piling through this channel which were delivered at the Standard Oil Company's property.

In 1914, several barges and gasoline launches navigated this channel. The "Petroleum No. 3," a sternwheeler also navigated this channel in 1914. The scow-schooner "Ada McKewen" navigated this channel and delivered a load of rock at the property of the Standard Oil Company in 1914. In 1915, the craft known as the "Shasta" navigated this channel with a cargo of eighty-five (85) tons of rock.

In 1915, Lewis Chamberlain navigated this channel on two occasions with a launch towing a barge loaded with rock, which barge drew five (5) feet of water.

In 1915, C. Anderson navigated the channel with a launch and towed the dredger of the defendant through the channel to about four hundred (400)

feet from the Standard Oil dike. This barge drew four and one-half ($4\frac{1}{2}$) feet of water.

Later Colonel Rees navigated this channel with the "Suisun," which vessel is eighty-six (86) feet in length and has a sixteen (16) foot beam and draws about five (5) feet nine (9) inches to six (6) feet of water.

On various other occasions, the channel or waterway has been navigated by other boats and vessels.

The evidence generally shows that for many years the stream has been navigated at will by the public desiring to use it, and there is no evidence showing that plaintiffs, or their predecessors in interest, ever attempted to prevent the public use of this stream as a navigable waterway.

According to the testimony of John H. Nicholl, who has been well acquainted and very familiar with channel "C" and the lands adjacent thereto since 1868, until the location of the Standard Oil plant and the growth and development of the City of Richmond in 1901, there had been little occasion to use this waterway for commercial purposes.

But according to the great weight of authority, even though the stream in question had never been used for useful purposes as a navigable waterway, yet the fact that it is capable of such use is sufficient to establish its status as a navigable waterway.

In the opinion of the learned trial Judge, it is stated that the mere depth of water will not place a stream in the category of a navigable waterway, other essentials being absent; nor, on the other hand, will the want of depth or capacity in part of its course take a stream out of that category if the other characteristics are present.

We assert that the evidence in this case shows that channel "C" has present every essential necessary to place it in the category of navigable waters as defined by the decisions of the various courts which have determined that question. It has the width of channel and depth of water necessary for the carriage of craft ordinarily used in local commerce. It has one terminus in an admittedly navigable arm of San Pablo Bay and the other on lands owned by a public utility, the Belt Line Railway Company. Its usefulness for commercial purposes has been demonstrated by the utilizing of its waters for the transportation of rock, gravel, piling, pile driver, barges and dredges. It is capable of continuous use for the carrying on of commerce between the City of Richmond and other ports.

The facts in this case bring it clearly within the requirements of a navigable waterway as prescribed in the case of *Rowe vs. The Granite Bridge Company*, 21 Pick. 344 referred to in the opinion of the Trial Judge, in which decision the following language is used:

“But in order to have this character (navigability) it must be navigable to some purpose, useful to trade or agriculture. It is not a mere possibility of being used under some circumstances, as at extraordinary high tides, which will give it the character of a navigable stream, but it must be generally and commonly useful to some purpose of trade or agriculture.”

Channel “C” measures up fully to these requirements. It is navigable to a purpose useful to trade. It has more than a mere possibility of being used, under some circumstances, at extraordinary high tides, it, in fact, being navigable at all ordinary tides for boats and barges drawing not more than four (4) feet of water, and at ordinary high tide for vessels drawing as much as ten (10) feet of water.

Channel “C” also meets the requirements cited by the Trial Judge in the case of *Harrison vs. Fite*, 148 Fed. 781, in which it is said:

“Mere depth of water without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a water course must have a useful capacity as a public highway of transportation.”

We submit that the evidence shows that the waterway in question is sufficient for more than pleasure boating or to enable hunters or fishermen to float their skiffs or canoes, and, in fact, has the capacity for, and has been used, as a pub-

lie highway of transportation by vessels engaged in commerce and carrying cargoes of gravel, sand, rock and other commodities.

The portions of the testimony cited show that the channel in its present state is navigable by vessels engaged in commerce, drawing from four (4) to ten (10) feet of water, and that the opinion of the trial Court, "that the conceded necessity of the work sought to be prosecuted is a recognition that the channel is not susceptible of being navigated in its present state without artificial aid" (Tr. page 69) is not borne out by the evidence. "Conceded necessity" is not a recognition that the channel is not susceptible of being navigated in its present state, but the work sought to be done is simply for the purpose of improving the navigability of the channel or waterway so that said channel will be navigable at all times for vessels, engaged in commerce, of deeper draft than vessels which can now navigate said channel. It is not unusual for the government or other public authorities to dredge waterways, which are concededly navigable without artificial aid, for the purpose of improving their navigability.

It does not at all impair the status of this channel as a navigable waterway that, if as suggested by the Trial Judge, it lies only at Richmond's "backdoor," (Tr. page 70) as commerce may as well be carried to the back door of a municipality as well as to its front door. In our humble opinion, we believe it is customary and generally

conceded that the water front of a City is its front door rather than its back door, especially so far as its commercial interests are concerned.

It is difficult to comprehend how this channel could be available to the Belt Line Railroad (Tr. page 70) without being of benefit to the general public, the Belt Line Railroad being a public carrier.

CHANNEL "C" BEING A NAVIGABLE WATERWAY WITHIN ITS TERRITORIAL LIMITS, THE CITY OF RICHMOND THEREFORE HAS THE AUTHORITY TO IMPROVE ITS NAVIGABILITY BY REMOVING THE SOIL IN THE BED OF THE CHANNEL UNDER SUCH NAVIGABLE WATERWAY.

The United States has power to make improvements to navigable waterways and channels.

Gibson vs. United States, 166 U. S. 269.

Cultivation Co. vs. Briggs, 229 U. S. 82.

Lumber Company vs. U. S., 204 Fed. 489.

The state has power to make improvements in navigable waterways, except in so far as it is prohibited by federal legislation.

St. Joseph Co. vs. Pidge, 5 Ind. 13.

McKeen vs. Delaware Canal Co., 49 Pa. State 424.

Lehigh Valley Ry. Co. vs. Canal Board, 130
N. Y. Suppl. 978.

*Corrigan Transit Co. vs. Chicago Sanitary
District*, 137 Fed. 851.

This power may be delegated by the state to a city.

Austin vs. Hall, 58 SW 479.

West Chicago Street Ry. Co. vs. People, 201
U. S. 506.

The Act admitting California to the Union was upon the condition "That all the navigable waters within said state shall be common highways and forever free to the inhabitants of said state as to the citizens of the United States, without any tax, impost or duty therefor."

Donnelly vs. U. S., 228 U. S. 243; 263.

The state has the right to control and regulate the public use of navigable water within its boundaries.

The People vs. Williams, 64 Cal. 498.

The municipality of Richmond through its charter has the right to improve the navigability of a navigable channel within its territorial limits.

"To control the bays, inlets and channels flowing through the city or adjoining the same, to widen, straighten and deepen the same where such work is necessary for the purposes of sanitation, drainage or removal of sewage:-

to fill the same when they are obstructions to proposed streets or roads, to control and improve the water front of the city and to maintain embankments and other works necessary to protect the city from overflow; to construct and maintain wharves, chutes, piers and breakwaters within the limits of the city."

Article 2, Section 10 of the Charter of the City of Richmond; Statutes 1909, page 1264.

See also Statutes 1913, page 605, as follows:

Section 1. There is hereby granted and conveyed to the city of Richmond in the county of Contra Costa, in the state of California, all the lands situate on the City of Richmond side of the bay of San Francisco and the bay of San Pablo, lying and being between the line of mean high tide and the line of mean low tide as the same has been or may be hereafter established between the prolongation into the bay of San Pablo of the north boundary line of the said city of Richmond and the prolongation into the bay of San Francisco of the southerly boundary line of the city of Richmond.

Sec. 2. The city of Richmond shall have and there is hereby granted to it the right to make upon said premises all improvements, betterments and structures of every kind and character, proper, needful and useful for the development of commerce, navigation and fishing, including the construction of all wharves, docks, piers, slips, and the construction and operation of a municipal belt line railroad in connection with said dock system."

Permission and authority were obtained from the War Department of the United States to improve

this channel according to certain plans and specifications adopted therefor. The permit in evidence granted by the War Department of the United States, July 2, 1914, was obtained pursuant to the provisions of the Act of Congress.

Thirty Statutes at Large, 1151.

When public authorities see fit to make improvements on land below highwater mark for purposes of navigation riparian owner must yield thereto, and his right is subordinate to the public right.

People vs. Southern Pacific, 166 Cal. 627.

People vs. Russ, 132 Cal. 102.

Mashburn vs. St. Joe Imp. Co., 113 Pac. 92.

The public has the right to make use of a navigable stream as a natural highway and if a riparian owner is injured by such use he is without remedy.

Lewis Blue Point Oyster Cultivation Co. vs. Briggs, 198 N. Y. 287,

Champlain Stone and Sand Co. vs. State,
142 App. Div. 94.

An injunction against the improvement of navigable waters will not be granted where the work is authorized and the means adopted are not improper.

Waterloo Woolen Mfg. Co. vs. Shanahan,
128 N. Y. 345.

Schuyler Steamboat Line vs. Newton, 21 Fed.
Case No. 12496; 9 Rep. 233.

THE STATE HAS NO POWER TO
ALIENATE LANDS UNDERLYING ANY
NAVIGABLE STREAM OR BODY OF
WATER SO AS TO CUT OFF THE PUB-
LIC RIGHT OF NAVIGATION.

While it may be conceded that the lands described in the amended bill were subject to sale by the State of California as salt marsh lands, swamp and overflowed or tide lands, and the state lawfully issued a patent therefor, it is not conceded that such patent operated so as to cut off the public right of navigation upon and over any navigable waters within the limits of such grant, nor is it conceded that such title includes the soil underlying the channel itself to the extent that such soil may not be removed for the purpose of either maintaining or improving the navigability of the waters overlying such soil.

In the opinion of the Trial Judge and in the trial briefs of appellees', strong reliance is placed on the case of *Knudson vs. Kearney*, 171 Cal. 250, which decision it is asserted supports the contention that it is possible for the state to extend to any individual the power to deny to the public the right to enjoy or use navigable waters for the purposes of commerce. The *Knudson-Kearney* case, *supra*, was an action between two individuals in which neither the state nor any political subdivision was a party. The only matter there considered was the power of the State to dispose of the *jus privatum* without regard to the *jus publicum*, which a very long and

consistent line of authorities hold, under no circumstances, can be disposed of by the State.

In that case, the court, referring to its decision in the case of *People vs. California Fish Company*, 166 Cal. 576, says:

“We were careful to say that ‘when the plan or system of improvement or development adopted by the state for promotion of navigation and commerce cuts off a part of these tide-lands or submerged lands from the public channels, so that they are no longer useful for navigation, the state may thereupon sell and dispose of such excluded lands into private ownership or private uses, thereby destroying the public easement in such portion of the lands and giving them over to the grantee, free from public control and use.’ ”

The Court further says:

“It is obvious in the provisions of the afore-said Acts of 1868 and 1870, that they were enacted in aid of navigation and for the purpose of providing for the improvements of San Francisco Bay so as to make it more suitable for navigation.”

The testimony in the case at bar shows that the swamp and overflowed, salt marsh and tide-lands described in the Amended Bill have never been improved, and that Channel “C” has been and still remains a natural waterway actually navigated and commercially useful, and has never been cut off from the public channels, and has never been shown to be no longer useful for navigation, so that the state could sell the same into private ownership.

so as to permit the destruction of the public right of navigation thereon.

But, on the contrary, the evidence does show that instead of the channel in question being no longer useful for navigation, its usefulness for that purpose is constantly increasing with the growth and development of the commercial activities of the city of Richmond, within whose confines it is entirely situated.

The Act admitting the State of California into the Union provides:

“That all of the navigable waters within the said state shall be common highways and forever free as well to the inhabitants of said state as to the citizens of the United States without any tax, import or duty therefor.”

In face of such an emphatic and positive declaration by Congress, how can it be held that, if channel “C” was ever a navigable waterway, the City of Richmond, its inhabitants or the public generally, can now be denied the privilege of navigating such channel or be denied the privilege of navigating such channel for commercial purposes, without doing violence to the very Act by which the State of California was admitted into the Union?

In *Heckman vs. Swett*, 99 Cal. 303, it was said:

“Navigable streams and the shores to ordinary high-water mark are held by the state in trust for the public; but qualified rights therein may be granted so far as they are not incon-

sistent with or are in aid of the principal use, viz: for the purpose of navigation. In the absence of the Act of 1859, regulating fisheries on Eel River, the right to use the shore between high and low-water mark, for fishing purposes was common to the people of the State."

This was an action to quiet title to a fishing privilege upon Eel River. Both parties claimed under swamp land patents issued by the State. Here the common law distinction between the *jus privatum* and *jus publicum* is clearly shown. The effect of the decision being that land of this character held by the State may be disposed of so far as the private trust or right is concerned but that the public right cannot be disposed of. This doctrine is perhaps more clearly enunciated in the case of *Oakland v. Oakland Water Front Co.*, 118 Cal. 160, in which case the court is called upon to construe the grant to Oakland of the tide lands between high tide and "ship-channel," and the grant by Oakland to H. W. Carpentier.

In the opinion, written by Chief Justice Beatty, that eminent Jurist, commenting on the doctrine, enunciated in *Illinois Central Railroad v. Illinois*, 146 U. S. 387, says:

"The conclusion of the Court upon these points and the doctrine thereby established are conceded to be a necessary part of its decision, and not only do not dissent from them, I entirely approve them. Stated briefly, I understand the doctrine of that case to be that the several states hold and own the lands covered by navigable waters within their respective

boundaries in their sovereign capacity, and primarily for the purpose of preserving and improving the public rights of navigation and fishery. They have in them a double right a *jus publicum* and a *jus privatum*. The former pertains to their political power—their sovereign dominion, and cannot be irrevocably alienated or materially impaired. The latter is proprietary and the subject of private ownership, but it is alienable only in *strict subordination to the former*.”

“No grant of lands covered by navigable waters can be made which will impair the power of a subsequent legislature to regulate the enjoyment of the public right. The grantee takes the mere proprietary interest in the soil and holds it subject to the public easement, and, if his ownership of the soil stands in the way of public works necessary for the improvements of navigation and in aid of commerce, the grant may be revoked upon the tender of a fair compensation for such lawful improvements as may have been made by the grantee in pursuance of any express or implied license contained in the grant. But in perfect accord with this doctrine it was also held that the state might alienate irrevocably parcels of its submerged lands of reasonable extent for the erection of docks, piers and other aids to commerce. It was further conceded to be a proper exercise of the power of the state to establish harbor lines and to authorize the reclamation of mud flats and shoals, where that could be done without detriment to the public rights. The filling up of such lands, it was said, was often an improvement of navigation, and an advantage to commerce and navigation, and therefore lands susceptible of reclamation by that method may be alienated irrevocably. This in general terms is the doctrine of the Chicago case, and of the numerous decisions therein reviewed and com-

mented upon. It is also the doctrine which has been distinctly announced by our predecessors in the former Supreme Court of this State.”

“The same doctrine is recognized in *Taylor vs. Underhill*, 40 Cal. 471, and was even more distinctly stated in *Eldridge v. Cowell*, 4 Cal. 80. There is no decision of this Court which conflicts in the slightest degree with the doctrine of these cases, each of which recognized the fact that the submerged lands of the state, though held and owned subject to a public trust, are nevertheless alienable in private ownership where capable of reclamation without detriment to the public right, and a fortiori where their reclamation will be of advantage to navigation and commerce.”

In the case of *People v. Kerber*, 152 Cal. 731 the defendant had erected a wharf in the harbor of San Diego upon the land below high-water mark, belonging to the State. The Court says: (723)

“Tide lands of this character vest in and belong to the state by virtue of its sovereignty—And when such tide lands are situated in a navigable bay and constitute a part of the water front thereof, as is the case here, they constitute property devoted to public use, of which private persons cannot obtain title by prescription, founded upon adverse occupancy for the period prescribed by the Statute of Limitations. In *Ward v. Mulford*, 32 Cal., on page 372, the Court says on this subject: ‘Such land is held in trust for the benefit of the people. The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purpose of navigation and fishery, and

whatever disposition she does make of them, her grantee takes them upon the same terms upon which she holds them, and, of course, subject to the public rights above mentioned. (See, also, *Oakland v. Oakland W. F. Co.*, 118 Cal., 182 (50 Pac. 277), page 184, where the same passage is quoted with approval. Property thus held by the State intrusted for public use cannot be gained by adverse possession, and the Statute of Limitations does not apply to an action by the State or its agents to recover such property from one who uses it for private purpose not consistent with the public use. This is the settled rule in this State with respect to all property so devoted to public use and tidelands, underlying waters forming part of the waters of a navigable bay used for navigation, are not, in this respect, to be distinguished from property used for other public purposes.”

It would seem to be a clearly settled fact that the common law doctrine as to the tenure of the State of its submerged lands, is the law of California.

“But this *soil* is held by the state, not only subject to but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell fish as floating fish. . . . The state holds the property of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This legislative jurisdiction of the State over it, and, from its duty to preserve unimpaired these public uses for which the soil is held.”

Smith v. Maryland, 18 How. 71.

In the case of *Mumford v. Wardell*, 6 Wall. 423, the question was whether the Alcalde grant of a water lot in San Francisco carried title. The Court held that it did not, saying:

“Necessary conclusion is, that the ownership of the lot in question, when the State was admitted into the Union, became vested in the State as absolute owner, subject only to the paramount right of navigation.”

While the State in the administration of its trust over tidal lands may make such a conveyance as will convey the *jus privatum*, it has nowhere been held that it may by such conveyance take away the public right of navigation, and particularly in a case like the one at bar, where the lands conveyed by the state have remained unimproved, and such grant is shown not to be in aid of navigation, but on the contrary, is now operating so as to destroy the public right of navigation.

“It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control of navigation upon them, and consequently, to the exclusion of private ownership of the waters or the soils under them.”

Packer v. Bird, 137 U. S. 661.

“Such title as to the shore and lands under water is regarded as incidental to the sovereignty of the state . . . a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery . . . and cannot be retained or granted out to individuals by the United States.”

Hardin v. Jordan, 140 U. S. 371.

The limitations upon the rights of the States to cut off the public right of navigation and fishery are clearly determined in the case of *Illinois Central Railroad v. Illinois*, 146 U. S. 387. In the opinion of the court rendered by Mr. Justice Field, it is said: (452)

“That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water, by the common law, we have already shown, and that the title necessarily carries with it control over the water above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open for pre-emption and sale. *It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over these, and have liberty of fishing therein freed from the obstruction or interference of private parties.* The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the state may grant parcels of the submerged lands; and so long as their disposition is made for such purpose, no valid objection can be made to the grants. It is grants of parcels of land under navigable waters that may afford foundation for wharves, piers, docks and other structures in aid of commerce and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases

as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. *Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purpose of the trust can never be lost except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.* It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, of which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the Courts expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable water of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. *The state can no more abdicate its trust over property in which the*

whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties except in the instance of parcels mentioned for the improvement of the navigation and use of the waters or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special nature, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State."

This case is one in which the Government title, the *jus publicum* of the people, had been conveyed and the Court held that such a grant could not be legally made. This is the only ground upon which the decision is based.

The act there under discussion placed under the control of the railroad company, nearly all the submerged lands of the harbor, putting it in the power of the company to delay indefinitely the improvement of the harbor. It was therefore held that such a grant was an invasion of the governmental right of the State.

In the case at bar the governmental authorities had recognized the navigability of the channel in

question and had granted to the authorities of the City of Richmond the right to improve its navigability by dredging the bottom of the channel. The case of *Knudson v. Kearney*, 197 Cal. 250, so far as any language contained in that decision might be construed as holding that the tide land commissioners, created by an Act of the Legislature of the State of California, had the power and authority to determine that lands which are in fact navigable, may be sold into private ownership, must be construed with regard to the fact that the Court there had only in mind the disposal of the *jus privatum* of the state, and if it were intended by the decision to hold that, regardless of the facts of actual navigability or actual adaptability of a stream or body of water for useful commercial navigation, such decision is contrary to the principle established in the *Illinois Central Railway vs. Illinois*, *supra*, and the other decisions holding to the same effect.

“The simple truth of the matter is that the state, always, of course, subject to the paramount control of the general government touching matters of navigation and commerce, has the right to sell into private ownership any of these water covered lands, the limitations upon its power in this regard being that such sales shall be in aid of, or at least not in derogation of its governmental trust to preserve needed navigable waters for the benefit of its people.”

Bolsa Land Co. v. Burdick, 151 Cal. 254.

The doctrine of the common law is that the public has a right to the navigation of the waters of the

Country, and that the title of the state is subordinate to that public right. The title of the state is in this sense *public* and *governmental*, and constitutes the *jus publicum* of the common law. In this sense only does the state hold the land in "trust." It holds in trust for the benefit of commerce and navigation and in the interest of all of its citizens, and of the citizens of the United States. Its duty is to keep the navigable waterways free from obstruction and to improve them as far as possible, in the interest of commerce and navigation. In this regard, *and in this regard only*, the state holds the title to its submerged tide lands in trust for the public. It is a governmental function purely, and has nothing to do with the private proprietorship by the state of such lands.

The portions of the testimony which we have quoted from the transcript show conclusively that channel "C" is a navigable waterway. That it has been navigated for years by vessels engaged in commerce, and that vessels engaged in commerce drawing from four feet to ten feet of water can navigate this waterway. That since the growth and development of the City of Richmond, the necessity for the use of this waterway for purposes of commerce and navigation have greatly increased, and that it is capable of an extensive and valuable use as a waterway for commerce and navigation. In view of the authorities cited, we contend that all the essential requisites are present and that by every test which has been approved by a Court, this waterway is navigable in law as well as in fact. In

view of the authorities cited, which are only a few of the numerous cases on the question, we do not think the right of the City of Richmond to improve the navigability of this waterway can be seriously questioned, or can be cut off by an attempted disposal of the private rights of the state. From the facts adduced and the law applicable thereto, the trial court erred in adjudging and decreeing that the defendant and intervenor and their officers, agents, servants, employees and attorneys be enjoined from cutting, dredging or excavating any ditch or canal, or carrying away the dirt or soil upon the property of the plaintiffs and described in the Amended Bill of Complaint of plaintiffs herein. (Assignment of Error No. I.)

The trial Court erred in ordering that an accounting of the loss and damage suffered by plaintiffs by reason of the acts of defendant and intervenor be referred to the Master in Chancery to hear testimony as to such loss and damage and to take an account thereof and to report the same together with his findings thereon to the Court. (Assignment of Error No. II.)

If our contention is correct that this is a navigable waterway, and we believe the testimony and the law show our contention in this regard to be sound, and that the waterway is navigable in fact and in law, and if our contention is correct, as we have hereinbefore pointed out, that the City of Richmond has the authority to improve the navigability of a navigable waterway within its territorial

limits, by dredging and deepening the bed of the channel under such water, then, it must necessarily follow that the Court also erred in ordering an account and in referring the matter to the Master in Chancery to hear testimony as to such loss and damage and to report his findings thereon to the Court. If the waterway is navigable as we contend, and if the city has the authority to improve its navigability, the Trial Court should not have enjoined the dredging, and no loss or damage has been suffered by the plaintiffs.

The Court erred in adjudging that plaintiffs have and recover their costs and disbursements in this suit. (Assignment of Error No. III.) If our contentions are correct concerning the specification of errors Nos. I and II, then it necessarily follows that the Court erred in adjudging that plaintiffs have and recover their costs and disbursements in this suit.

The Court erred in overruling and not sustaining defendant's and intervenor's objection to the admission in evidence of a certain agreement between the city of Richmond, intervenor and the Standard Oil Company, a corporation, dated March 30, 1915, wherein the city of Richmond agrees for the consideration of \$.1074 a cubic yard to deposit all material dredged from the lands described in plaintiffs' Amended Bill on the lands of the Standard Oil Company. (Assignment of Error No. IV.)

The record in this particular is as follows:

“*A. C. Faris*, being first duly sworn as a witness on behalf of plaintiffs, testified as follows:

I am city clerk of the city of Richmond. I have brought with me an agreement entered into by the city of Richmond and the Standard Oil Company sometime in April of last year, requiring the dumping of the dredgings of the south branch of the San Pablo levee or channel upon the land of the Standard Oil Company. That document is on record in the files of my office.

Mr. JOHNSON—I now offer this agreement in evidence; it is dated the 30th of March, 1915, between the Standard Oil Company and the city of Richmond.

The Court—Very well, let it go in.

Mr. WHITE. I object upon the ground that it is immaterial, irrelevant and incompetent. It does not tend to prove any issues in this case; is not a contract binding on this defendant. Defendant is not a party to it; is in no wise bound by it.

(After discussion.)

THE COURT—That only bears upon the question of its navigability—whether it is a navigable stream or not. Whether it has ever been recorded or treated as such. I do not see any harm to this. Let the matter go in.

(Contract introduced in evidence. Marked Plaintiff's Exhibit C.)

Mr. WHITE—Exception.

In order to improve the navigability of this waterway, it was necessary, first, to obtain a permit from the Secretary of War of the United States. (Defendant's exhibit "E"). The conditions upon which this permit, and permits generally are granted are that any materials dredged from the bed of a navigable waterway must be deposited behind suitable bulkheads for retaining same to prevent the material from returning into the navigable waterway.

While apparently the Court admitted the contract between the city of Richmond and the Standard Oil Company as having a bearing upon the question of whether or not Channel "C" is a navigable waterway (Tr. page 83), yet the Court's opinion shows that it served no useful purpose in the mind of the Court and did not aid in determining this question, but served as a basis for an opinion by the Court that the dredging done, and to be done, under the contract constituted the taking of the soil of the plaintiffs and depositing it on the land of the Standard Oil Company for the betterment of the latter. It is thus apparent that it was an error of the Trial Court, prejudicial to the appellants, to admit in evidence this contract which did not, and could not, in any way tend to prove whether or not the waterway was navigable, but which did form the basis for the conclusion of the Court that the soil of plaintiffs was being taken and deposited on the land of the Standard Oil Company for the betterment of the latter.

The permit issued by the Secretary of War of the United States (defendant's Exhibit "E") required that the material dredged from the channel of the navigable waterway should be placed behind bulkheads suitable for retaining the same. The soil could not, under the terms of the permit be allowed to be wasted in the channel, nor could it be deposited on plaintiffs' riparian land without their consent, and it is immaterial, so far as any of the issues in this case are concerned, as to where the waste materials were deposited, or upon whose land they were deposited so long as the terms and conditions of the permit were complied with, and no rights of the plaintiffs were violated. But, even if it were true that the contract in question did result in material benefit to the Standard Oil Company, it does not necessarily, or at all, follow that the dredging, which the City had the legal right to do, could be enjoined because any corporation, or individual, was to incidentally be benefitted thereby.

The Court erred in sustaining and not overruling plaintiffs' objection to the following question asked by defendant and intervenor to defendant's and intervenor's witness, H. E. Aine, as follows: Question: Are there any other bulkheads constructed where that dredging material could be placed so that it could not run back into the channel? Said objection being sustained upon the ground that the question was immaterial, irrelevant and incompetent, and to which question said witness would have testified that the bulkhead upon the property of the Standard Oil Company was the only bulk-

head behind which said dredging material could be placed. (Assignment of Error No. V.)

The importance of this testimony sought to be adduced is manifest when the opinion of the Court with relation to the deposit of the dredge material is read. (Tr. page 66). The reasonable inference to be drawn from the opinion of the learned Trial Judge is that the contract was let and the dredging done, not for the purpose of improving the navigable channel, but to enhance the value of the holdings of the Standard Oil Company by deposit of the dredge material thereon. In that regard the Court, in its opinion, says:

“And yet that is what is being done under the arrangement by which the work in this instance is being carried out—the soil of plaintiffs being taken and deposited on the land of the Standard Oil Company for the betterment of the latter.” (Tr. page 66.)

This inference could not have been reasonably drawn from the evidence, had the Witness Aine been permitted to testify that the bulkhead on the property of the Standard Oil Company, behind which the dredged material was placed, was the only bulkhead available for that purpose, and that in order to comply with the requirements of the War Department of the United States, it was necessary to place the dredged material upon the lands of the Standard Oil Company.

We submit that in view of the fact that the Court admitted the contract of the Standard Oil

Company with the City of Richmond, that we should have been permitted to show why such a contract was made.

It is axiomatic that the growth and welfare of any community is largely dependent upon its commercial facilities and that it is the duty of the Courts, wherever possible, to aid in securing to the public all possible transportation facilities, and that no body of water which is navigable in any sense should be closed as an avenue of transportation.

We, therefore, respectfully submit that both the law and the evidence show the waterway in question to be a navigable body of water which the public authorities have the right to improve, and accordingly the decision of the Trial Court should be reversed.

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EARL D. WHITE,
D. J. HALL,
Attorneys for Appellants.

No. 2913.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

NORTH AMERICAN DREDGING COMPANY OF
NEVADA, a Corporation, and CITY OF
RICHMOND, a Municipal Corporation,

Appellants,

vs.

LUCIO M. MINTZER and MAURICIA T.
MINTZER, as Executor and Executrix of
the Last Will and Testament of WILLIAM
MINTZER, Deceased,

Appellees.

BRIEF FOR APPELLEES

J. K. JOHNSON,

W. P. JOHNSON,

Attorneys for Appellees.

Filed this.....day of March, A. D. 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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BRIEF FOR APPELLEES

STATEMENT OF THE CASE.

The plaintiffs in the court below, appellees here, filed their bill praying for an injunction to restrain the defendant in the court below, North American Dredging Company of Nevada, a corporation, appellant herein, from cutting a ditch or canal across their property consisting of about 500 acres of land situated in the City of Richmond, County of Contra Costa, State of California. The bill alleged that complain-

ants' testator, William Mintzer, deceased, was seized as of fee and possessed of the land at the time of his decease, and for a great many years had been in possession of the land by himself and by his predecessors in title. The bill alleged that the defendant, without right, entered upon the land, and commenced to cut a ditch or canal 80 feet in width and 8 feet below low tide for a distance of from four thousand to five thousand feet across the land of testator, and was depositing the dirt or soil taken from the land upon the land of the Standard Oil Company, and that the acts of defendant constituted a wilful and malicious trespass, and a continuing waste of the property of complainants' testator.

The defendant in its answer denied that plaintiff was the owner of the land and alleged that the land in question belonged to the City of Richmond, and sought to justify its acts by setting up a contract with the City of Richmond, whereby it had agreed to dredge what was designated in its answer as the South Channel of the San Pablo Canal to a depth of eight feet below low tide, and to a width of eighty feet on the bottom and one hundred feet on the top, claiming that said so-called South branch of the San Pablo Canal was a natural waterway, and constituted a navigable stream, and that the City of Richmond had the right to make what was called a public improvement thereon. It also set up that it had discontinued the work when served with the order to show cause, and had suffered damage for which it made claim.

The City of Richmond was permitted to intervene

and set up substantially the same issues in its answer to the Bill of Complaint and also in its petition for intervention.

Complainants' answer to the Bill of Intervention of the City of Richmond denied that the City of Richmond had any title to the lands in question, or to the so-called waterway, or that the said so-called waterway constituted a navigable stream, and alleged affirmatively that the City of Richmond by attempting what municipalities so frequently claim to be a public improvement upon the lands of complainants' testator under the guise that it was improving a navigable stream, was really endeavoring to secure for the Standard Oil Company a valuable waterway over, upon and across the lands of plaintiffs' testator from the holdings of the Standard Oil Company to the Bay of San Francisco. Complainants' answer set up also that the City of Richmond and the Standard Oil Company had entered into an agreement whereby the City of Richmond agreed to have deposited upon the lands of the Standard Oil Company the dirt and soil abstracted by the dredger from the slough or so-called South Channel of the San Pablo Canal running through the lands of plaintiffs' testator, and that the Standard Oil Company had agreed to pay to the City of Richmond the sum of 10.74 cents per cubic yard, that being the exact price that the City of Richmond had agreed to pay the North American Dredging Company for dredging the said slough, whereby the Standard Oil Company would secure the dirt or soil of plaintiffs' testator for the cost of dredging;

the City of Richmond would thereby obtain for the Standard Oil Company, under the guise of a so-called public improvement, a valuable waterway over, upon and through the lands of plaintiffs' testator.

It was also alleged in the answer of plaintiffs to the Bill of Intervention of the City of Richmond that the City of Richmond proposed to use the said slough, when dredged, for the purpose of converting it into an open public sewer by leading the sewers from Castro street through the property of the Standard Oil Company and dumping the sewage in the said slough, when dredged. At the trial, however, this point was not pressed, and evidence was not introduced upon the question.

Judgment went for plaintiff, and an interlocutory decree enjoining and restraining defendants was made and issued. No motion for a new trial was made by defendants, and they have appealed from said interlocutory decree to this Court.

ARGUMENT.

Before proceeding to discuss the issues raised in this case, the Court's attention is called to the fact that at least three of the assignments of error filed by appellants on appeal do not comply with Rule 11 of this Court, in that they do not "set out separately and particularly each error asserted and intended to be urged."

The said assignments are as follows: (p. 108, Transcript of Record):

1. "In adjudging and decreeing that defendant and their officers, agents, servants, employees and attorneys be enjoined from cutting, dredging or excavating any ditch or canal, or carrying away the dirt or soil upon the property of the plaintiffs, and described in the amended Bill of Complaint of plaintiffs herein."

This it is respectfully submitted is too general, vague and indefinite, and does not amount to a specific statement of error.

It is equivalent to saying that the judgment is against law, and raises all the issues of the case.

In the case of *Doe v. Waterman Mining Co.*, Ninth Circuit, 1895, reported in 70 Fed. 455, this Court says, at page 461:

"There are nine assignments of error in the transcript. In the brief seven additional assignments of error are made. The contention of the appellant is that these additional assignments are only specifications under the first assignment of error. Rule 11 of this Court requires that the assignments of error shall be separately and particularly set out. The object of setting forth assignments of error is to apprise the opposite counsel and the Court of the particular legal points relied upon for a reversal of the judgment of the trial court. The attempt to make the assignments of error more particular in a brief is not proper. It is in fact an attempt to amend the record in this particular without permission of the Court. The assignment of error in question reads as follows: 'There is error in said decree in this: that said court, upon the whole evidence, should have rendered a decree in favor of the complainant.' This is too general. There is no specification showing wherein the decree is not supported by the evidence."

In the case of *Smith v. Hopkins, Seventh Circuit*, found in *120 Fed. 921-923*, the Court says:

"The first, second and third assignments of error are to the effect that the judgment is contrary to law; that it is contrary to the evidence; that it is contrary to the preponderance of evidence. These assignments are unavailing under the rule, that 'an assignment of errors shall set out separately and particularly each error asserted and intended to be urged.'

"The first assignment does not specify wherein the judgment was contrary to law, nor do the second and third assignments specify—assuming that we may review the evidence—wherein the judgment was contrary to the evidence, or to the preponderance of the evidence.

"The eighth assignment, that the court erred in rendering judgment, is alike unavailing, being too general for review.

"'The Court erred in entering judgment for plaintiff against the defendant' does not raise a question for consideration of this Court."

Western Union Telegraph Co. v. Wimland
(*Eighth Circuit*), *182 Fed. 193-194*.

See also the concurring opinion of Smith, Circuit Judge, in the case of *Walter Baker & Co. v. Gray*, *192 Fed. (Eighth Circuit) 921*, found at page 929, wherein the Circuit Judge cites a large number of cases supporting the rule.

The second assignment of error (p. 108, Transcript of Record) is as follows:

"In ordering that an accounting of the loss and damage suffered by plaintiffs by reason of the acts of defendants and intervenor be referred to the Master in Chancery to hear testimony as to

such loss and damage, and to take an accounting thereof, and to report the same, together with his findings thereon, to the Court."

This assignment of error is subject to the same criticism as that of Assignment No. 1, and also to the further criticism that if the decision of the Court in rendering its judgment in favor of complainants and against defendants and enjoining said defendants be correct, the matter of reference to the Master to take testimony follows as a matter of course.

The third assignment (p. 108, Transcript of Record) is as follows:

"In adjudging that plaintiffs have and recover their costs and disbursements in this suit."

The same criticism applies to this assignment of error as to the two preceding ones, and also it is a question whether this is a matter subject to an assignment of error as costs follow the judgment as an incident, unless otherwise ordered by the trial judge.

The fourth assignment of error is as follows (p. 108, Transcript of Record):

"In overruling and not sustaining defendant's and intervenor's objection to the admission in evidence of a certain agreement between the City of Richmond, intervenor, and the Standard Oil Company, a corporation, dated March 30th, 1915, wherein the City of Richmond agrees for a consideration of \$.1074 a cubic yard to deposit the material dredged from the lands described in plaintiffs' amended Bill on the lands of the Standard Oil Company."

Plaintiffs' answer to the Bill of Intervention of the

City of Richmond affirmatively alleged the existence of such a contract. It was between the Standard Oil Company and the City of Richmond, intervenor herein, which now ranks as one of the defendants in the court below, and appellant here, and was a proper matter to be introduced in evidence. While this assignment of error is not subject to the criticism aimed at Assignments Nos. 1, 2 and 3, still it is submitted the ruling of the court in admitting the contract in evidence was correct.

The fifth assignment of error reads as follows (p. 109, Transcript of Record) :

"In sustaining and not overruling plaintiffs' objection to the following question asked by defendant and intervenor of defendant's and intervenor's witness, H. E. Aine, as follows:

"Q. Are there any other bulkheads constructed where that dredging material could be placed, so that it could not run back into the channel?"

"Said objection being sustained upon the ground that the question was immaterial, irrelevant and incompetent, and to which question said witness would have testified that the bulkhead upon the property of the Standard Oil Company was the only bulkhead behind which said dredging material could be placed."

No criticism is made as to the form of this assignment of error, but no exception to the ruling of the court was noted by the defendants, or either of them, at the trial of the cause.

Appellees claim that of the five assignments of error contained in the record, Nos. 1, 2 and 3 are insufficient under Rule 11 of this Court, and should

be disregarded; that No. 4 is right, and that No. 5 is not supported by the record, and for that reason it is asked that the appeal be affirmed.

Proceeding now to the presentation of the appeal upon its merits, it appears that the pleadings set up the following issues:

I. Title to the property in question described in plaintiffs' amended Bill.

II. Whether the slough running through the lands of plaintiffs' testator described in the amended Bill and designated by the defendants in their answers as the South Channel of the San Pablo Canal is a navigable stream.

III. Whether the dirt or soil underlying the said slough was the property of plaintiffs' testator, and its removal by the defendants constituted waste.

I.

TITLE.

As to the question of the title of the lands in controversy, it seems there should be no dispute.

"The plaintiffs offered and the Court admitted evidence of plaintiffs' title to the land and property described in the Amended Bill of plaintiffs on file herein and proved their title to the said land described in said Amended Bill of Complaint as set forth in said Amended Bill of Complaint, with the exception of the strip of land about one hundred or two hundred feet wide owned by the Belt Railway Company running across the lands of plaintiffs, and coming out near

the point marked No. 20 on a map admitted in evidence, and marked Plaintiffs' Exhibit 10" (p. 73 of Transcript, proceedings had before Hon. Wm. C. Van Fleet, Judge).

This, it would seem, would effectually dispose of any claim of the City of Richmond to title to the said property, or to the so-called channel. There was no evidence introduced by the defendants at the trial to controvert the chain of title introduced in evidence by the plaintiffs, and the muniments of title and acts of possession and ownership running through a period since 1871 down to the present time.

Under the case of *Knudson v. Kearney*, 171 Cal. 250, it would appear that the title of plaintiffs' testator was vested in him in fee. In that case the Supreme Court of the State of California holds that a grant precisely like the ones by which plaintiffs' testator obtained title to the lands by State patents from the State of California issued to his predecessors in interest is valid and conveys the fee. The opinion is by Shaw, Judge, who wrote the opinion in the case of *People v. California Fish Co.*, 166 Cal. 576, and he shows that "In the present case the situation is precisely the reverse" of what it was in the so-called San Pedro cases.

In addition to what is here said, it is respectfully urged that even though there was testimony introduced at the trial controverting the claim of title of plaintiffs to the land in question, which there was not, yet the finding of the trial judge should not be disturbed unless error plainly appeared. No such error is shown,

and indeed no attempt is made by appellants to disturb the decision of the trial court in this regard. And it might be added that upon argument in the court below upon written briefs the defendants abandoned any claim of title to the property in question, and presented no argument whatever attempting to controvert the argument of plaintiffs in the court below.

II.

THE SLOUGH IS NOT A NAVIGABLE STREAM.

This question could be disposed of by invoking the rule that the decision and findings of the trial court upon conflicting evidence will not be disturbed by this Court upon appeal.

The court made a personal view of the premises.

“During the trial of the cause the court by consent and in company of counsel, made a personal view and inspection of the property involved in the cause and of the premises and of the slough marked ‘C’ in Exhibit 10.” (Transcript of Record, p. 106.)

The evidence introduced at the trial of the cause amply sustains the finding and decision of the trial judge that this slough is not a navigable stream. It appears that in 1871 Dr. Tewksbury, the predecessor in interest of plaintiffs’ testator, and their grandfather, constructed a dyke or levee along the north side of the lands across the slough near its mouth. Evidences of the dyke are yet visible at the banks of the slough. On the maps introduced in evidence and

marked "Exhibits 10 and 11" the dyke is shown as crossing the slough.

Testimony of John H. Nicholl (pp. 76-79, Transcript of Record).

Antone P. Borbi (pp. 80-81, Transcript of Record) testified that he was the tenant of Dr. Tewksbury from 1873 down to the time of Dr. Tewksbury's death, and afterwards of Dr. Tewksbury's widow, Mrs. Emily S. Tewksbury, down to the year 1901. That the dyke ran across slough marked "C," and was kept in repair by him for nearly thirty years, and that he pastured cattle upon the land every year from June until October.

This testimony is sustained by that of Benjamin Boorman as to the dyke in question, and the pasturage of cattle. (Pp. 81-82, Transcript of Record.)

Appellants rely upon the testimony of Col. Rees, United States Engineer in charge for the War Department of the United States Government, but the fact is Col. Rees never saw the slough in question until December 8, 1915, when he took his launch "Suisun" up the channel to the Standard Oil Company's works. This was after the dredging had been done at the southern end of the slough, but the gallant Colonel admitted that he went up the slough upon the flood time, and remained there only fifteen minutes, and went out upon the flood tide.

When Capt. Anderson took his dredger up the slough in April, 1915, he went up on the flood tide. He stopped about four hundred feet from the Standard Oil dyke and at low tide his dredger, which drew

four and one-half feet, rested on the bottom of the slough. The water there was less than two feet at low tide. The cross section maps of the engineer of the City of Richmond showed that at low tide the south end of the slough at that point is high and dry. All of these so-called acts of navigation amount to nothing.

Capt. Kleesow rowed a hunting boat in 1880 or 1882 for a distance of three miles up the slough. The slough is less than one mile long. He testified that he saw no dyke.

Judge Lindsay rowed and sailed his boat and hunted and fished over the marsh for twenty years.

Mr. Aine, assistant mechanical engineer for the Standard Oil Company, towed several loads of piles up the slough in 1907. He used a light draught launch, and went in and out on the flood tide. The next use of the slough was in March, 1914, when he piloted a launch towing a barge. Two days later he piloted Petroleum No. 3, a light draught stern-wheeler. Both the launch towing the barge and Petroleum No. 3 went in and out on the flood tide. These are not acts of navigation. These vessels were not engaged in commerce. They merely went up there in order to make evidence, so as to ask Col. Rees for his permit to improve a navigable stream. This permit of the War Department simply says we have no interest in this matter, and you can go ahead so far as the War Department is concerned. It is not the act of the War Department, which decides that it is necessary that the stream be improved for purposes

of the government. It confers no authority upon the City of Richmond to perform this dredging and so-called public improvement. And it is submitted that this showing fails to meet the legal requirements of a navigable stream. Mere depth of water is not sufficient to render a stream navigable in law, and in this case sufficient depth of water has not been shown save for launches, scows and barges, and then only at high tide.

No bona fide user of the stream for purposes of navigation and commerce has been shown; and, indeed, the evidence shows that such use is impossible. In addition, no means of access of the public to the slough exists. The head of the slough is at least one-fourth of a mile from the north end of Standard avenue. It is true the Standard Oil Company has cut a canal on its property to connect with the slough, but the public have no rights on their canal, as it terminates one hundred feet east of Standard avenue.

But the slough, if navigable, must be navigable in its natural state, and not by the aid of artificial means.

On what constitutes navigability in law the following authorities are cited:

In Kinney on Irrigation and Water Rights, 1912 Edition, under the heading Navigable Stream, Vol. 1, page 563, the learned jurist says:

"It has been settled by a long line of decisions that the navigable waters of the United States are those which are actually navigable in fact and which by themselves or their connections with other waters for a period long enough to be of commercial value are of sufficient capacity to

float water craft for the purposes of commerce, trade, transportation, or even pleasure, between this country and foreign countries, or between the states of this country, or between different points in the same state.

"To be navigable, a water course must have a useful capacity as a public highway for transportation." (P. 566.)

"In order to be a public body of water, it must be accessible to the public, and have a terminus by which the public can enter it and another from which they can leave it. Hence, creeks which open in navigable waters, but merely lead into private lands are not public navigable waters." (P. 567.)

"A stream which can only be made navigable or floatable by artificial means is not a public highway." (P. 570.)

"To meet the test of navigability as understood in the American law, a watercourse should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state, and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious and unprofitable, is not sufficient. * * * Mere depth of water, without profitable utility will not render a watercourse navigable in the legal sense so as to subject it to public servitude. * * * To be navigable a watercourse must have a useful capacity as a public highway of transportation."

Harrison v. Fite, 148 Fed. 781-3.

In *Chisholm v. Caines*, 67 Fed. 285, Simonton, Circuit Judge, at page 292, asks:

“What is the essential characteristic of a public navigable stream? Not the bare fact that the tide ebbs and flows therein (citing cases). Nor does the answer to this question depend upon its depth, nor upon its width. * * * On the other hand neither its depth nor width nor uninterrupted course, nor freedom from obstruction, nor constant supply of water, nor an unvarying floatable condition, nor all combined would in themselves make it navigable water. Else a pond or lake within the domain of a citizen surrounded on all sides by his land, would be a navigable water. It is evident that to make a body of water a public navigable stream, it must be accessible to the public. The essential characteristic of a navigable stream is that it is, or is capable of becoming, a public highway—a means open to the public of passing from one place where they have a right to be, to another, in which they have the same right.”

The term navigable waters of the United States has reference to commerce of a substantial and permanent character to be conducted thereon.

Leovy v. U. S., 177 U. S. 621-8.

In this case Mr. Justice Shiras, Judge, at page 628, reviews the cases “from which may be derived a definition of navigable waters.”

In *Rose v. The Granite Bridge Corp.*, 21 Pick. 344, Shaw, C. J., says at page 347:

“It is not every ditch in which the salt water ebbs and flows, through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes, which can be considered a navigable stream. Nor is it

every small creek, in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable. But in order to have this character, it must be navigable to some purpose, useful to trade or agriculture. It is not a mere possibility of being used under some circumstances, as at extraordinary high tides, which will give it the character of a navigable stream, but it must be generally and commonly useful to some purpose of trade or agriculture."

Where a river is not navigable in its natural condition the State may not make it navigable by artificial means.

People v. Economy L. & P. Co., 89 N. E. (Ill.) 760-8.

To be navigable in law it must be navigable in fact; that is, capable of being used by the public as a highway for the transportation of commerce. *Lurton, J.*, in

Toledo Liberal S. Club v. Eric S. Club, 90 Fed. 680-2.

A stream in which the tide ebbs and flows and in which small boats and tugs have gone up and down during high tide is not navigable.

Wilson v. Prickett, 139 Pac. 754-5 (Wash.)

"To hold that the State can by artificial means make a stream navigable which in a state of nature was not navigable and thereby deprive riparian owners of their property rights in the bed of the stream, is simply to hold that private property may be taken or damaged for public use without compensation."

People v. Economy Light & Power Co., 89
N. E. (Ill.) 760-768.

Viewing the evidence in the light of the foregoing, it is manifest that the defendants have failed to prove that this slough is a navigable stream.

The City of Richmond has no authority to cause this so-called public improvement. No authority for it to enter into the contract with the defendant exists. The permit from Col. Rees for the War Department of the United States amounts to no more than saying there is no objection on our part. The United States does not ask that the work be done. Congress has not ordered it. The Secretary of War has not ordered it. Neither has the State of California ordered that the work be done. Nor has the State authorized the City of Richmond to do the work.

The Charter of the City of Richmond, found in Statutes of California 1909, page 1264, under Article II, headed "Powers," subdivision 10, is as follows:

"To control the bays, inlets and channels flowing through the City or adjoining the same; to widen, straighten and deepen the same where such work is necessary for the purpose of sanitation, drainage or removal of sewage; to fill the same when they are obstructions to proposed streets or roads; to control and improve the water front of the City, and to maintain embankments and other works necessary to protect the City from overflow; to construct and maintain wharves, chutes and breakwaters within the limits of the city."

No proceedings to acquire jurisdiction to order the work done were had. It is doubtful if there is any

authority by which the city could lawfully order this work done. But it suffices to say that no order was made.

Without attempting to review all of the cases cited by appellants in their brief, attention is called to the following:

The case of *Kamm v. Normand*, reported in 126 *Am. St. Rep.* 692, is a logging stream case from Oregon. The plaintiff was the owner of land situated on a creek down which the defendants were floating logs to market. In order to do this the defendants had built a splash dam, and used the head of water impounded by it to drive the logs down the stream. The action was one for an injunction to prevent their use of the stream in that manner. At the trial defendants prevailed. On appeal the judgment was reversed. What there is in this case amounts to authority for the appellees here, but the interesting part of it is the quotation by the Court from a former decision by the Court relating to the same stream found on page 702 of the report:

“Whether the creek in question is navigable or not for the purposes for which the appellant used it depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such and its length and capacity so limited that it will only accommodate a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated as to have such length and capacity as to enable it to accommodate the public generally as a means of transportation.”

In the case at bar the slough in question is less than one mile in length, and passes through the lands of plaintiffs. Nothing is produced along its banks, no logs or lumber to be floated down its stream, or agricultural products to be sent to market over it; no manufactured products, save perhaps that of the Standard Oil Company alone. Added to that there is no access to the slough by the public. The claim of defendant and intervenor that because the Richmond Belt Railway Company owns a strip of land one hundred and ninety-eight feet in width across or over the southern end of the slough, the public has access to the slough is ridiculous. There are no improvements upon said strip of land. It is merely a right of way, and so far as the public is concerned is private property, and the public has no right thereto. The public generally is not interested, and the slough has neither length nor capacity to enable it to accommodate the public for the purpose of navigation and commerce.

The quotation from "*The Montello*," 20 Wall. 430, found in appellants' brief, combines the language used by Mr. Justice Davis, winding up with the quotation of the Justice from the language used by Chief Justice Shaw in the case of *Rowe v. Granite Bridge Corporation*, 21 Pick. 324. This case of "*The Montello*" was one where the government of the United States had libeled the steamer "*The Montello*" for non-compliance with certain acts of Congress as to enrollment, license, etc., of all vessels of a certain tonnage navigating the navigable waters of the United States. The

defendants in that case had denied that Fox River upon which the vessel was plying was a navigable stream. There is no point of similitude between the Fox River in Wisconsin and the slough involved in this case in Contra Costa County, California. The Fox River had been improved at great expense to render it navigable by a private corporation, and tolls were charged the vessels for navigating it. A large commerce from early days had used the stream. After these improvements by the private corporation, the United States took charge of the stream, bought out the corporation, and reduced the tolls. Therefore general language like that quoted in appellants' brief is of no value in deciding the case where the facts are entirely dissimilar.

Appellants seem to rely very much upon the decision of Chief Justice Beatty of the Supreme Court of the State of California, found in the *City of Oakland v. Oakland Waterfront Company*, 118 Cal. 160. At page 182 at the outset of his decision, Mr. Chief Justice Beatty stated:

"This is an action to determine conflicting claims to real estate."

The question in that case was the consideration of the terms of the grant to the Town of Oakland by the State Legislature, and involved the ownership of the waterfront by the City of Oakland, and the Court found it necessary to locate the "ship channel," used by the Legislature as one of the calls of the grant. No question regarding a navigable stream is raised in this

case, and it is useless for counsel on the other side to contend that it does.

The next two cases cited in appellants' brief come from the State of Washington.

In *Judson v. Tidewater Lumber Company*, 98 Pac. 377, the portion quoted in their brief is taken from the headnote. That was an action for damages occasioned by the alleged wrongful obstruction of a portion of the channel of the Puyallup River. The parties were riparian proprietors. What is said about navigability of the stream appears at page 379, at the middle of the second column. It may be assumed that there was no real question as to whether or not the Puyallup River was a navigable stream. Certainly nothing in the case cited sheds any light upon the case at bar.

In the other case, *Dawson v. McMillan*, 75 Pac. 807, the portion quoted is also taken from the headnote. Presumably because the word "slough" is used in the headnote, counsel on the other side deemed it was a valuable case, but an examination shows that it is of very little value. It was an action to restrain certain acts of obstruction in the branch of the sea known as "McElroy's Slough." An injunction was granted, but on appeal no question was made upon the findings. It follows that it was determined by the findings that this slough was navigable. There was nothing for the Court upon appeal to decide, there being no attack made on the findings.

Appellant's argument that the State has no power to alienate lands underlying any navigable stream or

body of water so as to cut off the public right of navigation has no place here in view of the decision of the Supreme Court of California in the case of *Knudson v. Kearney*, *supra*, which squarely holds that the State's patent in a precisely similar patent to the ones from which plaintiffs' testator deraigned title conveyed the land in fee.

So also is their discussion of the question of *jus publicum* and *jus privatum* entirely out of place here. This is not a proceeding by the Attorney-General of the State to have a State patent cancelled. If it were, possibly the doctrine might be invoked.

But in this case the doctrine has no justification for the invasion of plaintiff's property by a municipality under guise of public improvement.

Nor need plaintiffs prove improvements to the waterway done or made by them. The question here is, Is the slough a navigable stream? The trial court, after full hearing and personal view and inspection, has decided that the slough is not navigable in law.

Without attempting to review the remaining numerous cases cited by appellants in their brief, it is respectfully maintained that the decision of Judge Van Fleet, after an inspection and view of the premises, and upon testimony taken at the trial, is correct, and should be sustained, and furthermore, that the rule as to the finding of the trial court upon conflicting evidence should be sustained.

III.

THE REMOVAL OF THE DIRT AND SOIL BY DREDGING THE SLOUGH RUNNING THROUGH PLAINTIFFS' LAND AMOUNTED TO A CONTINUING TRESPASS AND CONTINUING WASTE UPON THE PROPERTY OF PLAINTIFFS.

The property described in plaintiffs' amended Bill, comprising about five hundred acres of land, and being owned by the plaintiffs' testator in fee at the time of his death, and his being seized and possessed, and exercising acts of ownership over and upon said property, and the said slough running wholly through the lands of plaintiffs' testator, and his predecessors in interest, and the same having been conveyed to his predecessors in interest by State patent without any delineation of said slough, it follows that the title to the bed of the slough vested in fee in the plaintiffs' testator irrespective of the question whether said slough was a navigable stream or not, and the removal of the soil or dirt by dredging said slough and depositing the same upon the lands of the Standard Oil Company amounted to a continuing trespass and continuing waste of the property of plaintiffs' testator.

It is respectfully submitted that upon the three questions, title to the land, navigable stream, property in the dirt or soil underlying the slough, or so-called navigable stream, were all correctly and properly

decided in favor of plaintiffs in the court below by the trial judge, and the decision of the trial judge ought to be sustained.

All of which is respectfully submitted.

J. K. JOHNSON,

W. P. JOHNSON,

Attorneys for Appellees.

No.

2014

9

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

SOCIETE NOUVELLE d'ARMEMENT,
Plaintiff in Error,

vs.

J. R. BARNABY,

Defendant in Error.

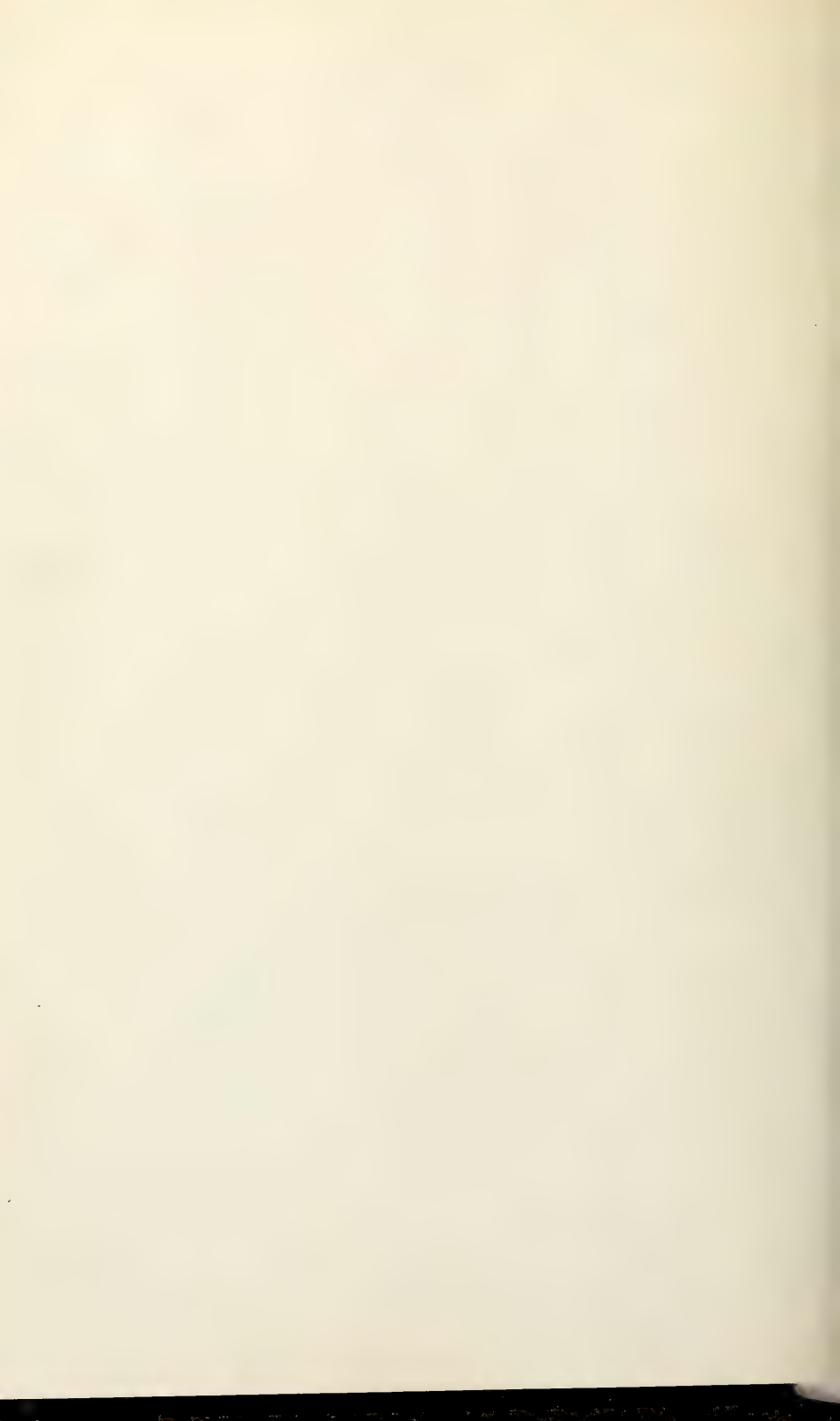
Transcript of Record.

Filed

JAN 8 - 1917

F. D. Monckton
Clerk

Upon Writ of Error to the United States District Court for the
Western District of Washington, Northern Division.



No.

In the District Court of the United States

For the Western District of Washington

Northern Division

SOCIETE NOUVELLE d'ARMEMENT,
Plaintiff in Error,

vs.

J. R. BARNABY,

Defendant in Error.

Transcript of Record

Upon Writ of Error to the United States District Court for the
Western District of Washington, Northern Division.

JAMES KIEFER, ESQ.,

Attorney for Defendant and Plaintiff in Error,
Suite 327 Colman Building, Seattle, Washington.

WILLIAM H. GORHAM, ESQ.,

Attorney for Plaintiff and Defendant in Error,
653 Colman Building, Seattle, Washington.

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In the District Court of the United States for the Western
District of Washington. Northern Division.

J. R. BARNABY, Plaintiff,	}	No.....
vs.		
SOCIETE NOUVELLE D'ARMEMENT, Defendant.		

Complaint.

The plaintiff complains and alleges:

I.

That he is a citizen of the United States of America and a resident of the City of Seattle in the State of Washington.

II.

That during all of the times herein mentioned the defendant was and is a corporation organized and existing under the laws of the Republic of France; and for more than three years last past has maintained and is maintaining a line of vessels plying with reasonable regularity in the carrying trade between the ports of the state of Washington, on Puget Sound, and foreign ports, importing and exporting general cargoes to and from ports in said state and during said three years last past has maintained and is now maintaining a general agent at Seattle, Washington, for the more convenient transaction of its business in said state.

III.

That between the 29th day of October, 1910, and the 6th day of June, 1912, in the state of Washington and the Province of British Columbia, in the Dominion of Canada, plaintiff rendered services as a ship's agent to the defendant, at its special instance and request, in writing.

IV.

That the reasonable value and worth of said services is the sum of five thousand (\$5,000.00) dollars.

V.

That defendant has not paid the same nor any part thereof, although plaintiff has demanded payment from defendant therefor.

Wherefore, plaintiff demands judgment against said defendant in the sum of five thousand (\$5,000.00) dollars, together with interest at the legal rate from the 6th day of June, 1912, and for his costs and disbursements herein.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

(Indorsed:) Complaint filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 9, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.

UNITED STATES OF AMERICA:

In the United States District Court for the Western District of Washington. Northern Division.

J. R. BARNABY, Plaintiff,

vs.

SOCIETE NOUVELLE D'ARMEMENT, Defendant.

}
No. 3241

Summons.

*The President of the United States of America, Greeting:
To the above named defendant: Societe Nouvelle
d'Armement—*

You are hereby required to appear in the United States District Court, in and for the Western District of Washington, Northern Division, within twenty days after the day of service of this summons upon you, exclusive of the day of service, and answer the complaint of the above named plaintiff, now on file in the office of the Clerk of said Court, in the City of Seattle, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiff will apply to the Court for the relief demanded in said complaint.

Witness the Hon. Jeremiah Neterer, Judge of said Court, this 9th day of February, in the year of our Lord, one thousand nine hundred and sixteen, and of our independence the one hundred and fortieth.

(SEAL)

FRANK L. CROSBY,
Clerk.

By ED M. LAKIN, *Deputy Clerk.*

Marshal's Return.

UNITED STATES OF AMERICA, }
WESTERN DISTRICT OF WASHINGTON, } ss.

I hereby certify and return that I served the within summons on the therein-named Societe Nouvelle d'Arme-ment, by serving Charles Jolivet, Agent, by handing to and leaving a true and correct copy thereof with Charles Jolivet, Agent, personally, at Seattle, Wash., in said District, on the 9th day of February, A. D. 1916.

JOHN M. BOYLE, *U. S. Marshal.*

By EDWARD WILLIAMS, *Deputy.*

Marshal's Fees, \$2.12.

(*Indorsed:*) Summons. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 14, 1916. Frank L. Crosby, Clerk. E. M. Lakin, Deputy.

In the United States District Court, in and for the Western District of Washington. Northern Division.

J. R. BARNABY, Plaintiff, }
vs. } No. 3241
SOCIETE NOUVELLE D'ARMEMENT, Defendant. }

Answer.

Comes now the defendant and answering the complaint of the plaintiff herein, says and alleges:

I.

Said defendant denies each and every allegation contained in paragraph three of said complaint, except that he admits that at the request of the defendant, the plaintiff performed certain services in regard to ships business at about the times mentioned in plaintiff's complaint.

II.

Said defendant denies each and every allegation contained in the fourth and fifth paragraphs of said plaintiff's complaint.

And for a first affirmative and separate defense, this defendant says and alleges:

I.

That on the 22d day of October, 1914, the plaintiff herein began an action in the Superior Court of King County, Washington, being No. 104,397 of the files of said court, against this defendant for the same cause of action, for the same services and upon the same contract, pleaded and relied upon by the plaintiff herein and covering the same transactions, and in said cause, this defendant appeared and issue was joined therein and trial had so that on the 18th day of May, 1915, a judgment was entered in said Superior Court, in said cause, in favor of the plaintiff and against this defendant in the sum of \$1081.000 and plaintiff's costs and said judgment was thereafter fully paid and satisfied by this defendant.

II.

That in order to sustain his cause of action in said suit in said Superior Court, the plaintiff offered evidence of the same transactions as are referred and relied upon herein, and in plaintiff's bill of particulars filed herein and all the matters mentioned in plaintiff's complaint herein and in his bill of particulars herein, were litigated and should have been litigated in said action in said Superior Court.

And for a second affirmative complaint, defendant says and alleges:

I.

That this action was not begun or commenced within the time limited by the statutes of the State of Washington for the commencement of said action, to-wit: within three years from the rendition of the services sued for.

Wherefore, defendant demands that plaintiff's complaint be dismissed; that he take nothing thereby, and that this defendant recover his costs and disbursements herein.

JAMES KIEFER,
Attorney for Defendant.

STATE OF WASHINGTON, }
COUNTY OF KING, } ss.

Charles Jolivet, being sworn according to law, says that he is the agent of the defendant above named, in the City of Seattle, and in charge of his profits and business therein; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

C. JOLIVET.

Subscribed and sworn to before me this 9th day of March, 1916.

(SEAL)

JAMES KIEFER,

*Notary Public in and for the State of
Washington, residing at Seattle.*

Copy of within Answer received and service of same acknowledged this 9th day of March, 1916.

WM. H. GORHAM,

Attorney for Plaintiff.

(Indorsed:) Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 11, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,

vs.

SOCIETE NOUVELLE D'ARMEMENT, Defendant.

} No. 3241

Reply.

Comes now the plaintiff herein and for reply to defendant's answer herein, says and alleges:

I.

Replying to the first affirmative and separate defense of said answer he denies generally each and every allegation therein contained.

II.

Replying to the second affirmative defense of said an-

swer he denies specifically each and every allegation therein contained.

Wherefore plaintiff prays as in his complaint herein.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Copy of with Reply received this 7th day of April, 1916.

JAMES KIEFER,
Attorney for Defendant.

(*Indorsed:*) Reply. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 1, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the United States District Court, Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,	} No. 3241
vs.	
SOCIETE NOUVELLE D'ARMEMENT, Defendant.	

Stipulation Waiving Jury.

It is hereby stipulated by and between the parties hereto that a jury is hereby waived at the trial of the above entitled cause.

Dated, Seattle, July 7th, 1916.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

JAMES KIEFER,
Attorney for Defendant.

(*Indorsed:*) Stip. to waive jury. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 8, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.

In the District Court of the United States, Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,	} No. 3241
vs.	
SOCIETE NOUVELLE D'ARMEMENT, Defendant.	

Memorandum of Decision, Filed August 21, 1916.

WILLIAM H. GORHAM, *For Plaintiff.*

JAMES KIEFER, *For Defendant.*

CUSHMAN, *District Judge.*

Plaintiff sues the defendant, a corporation of the Republic of France, maintaining a line of vessels plying between ports of Puget Sound and those of foreign countries, for services rendered as ship's agent between October, 1910, and June, 1912. The defenses are: The Statute of Limitations and that the present suit is barred by reason of a former judgment for the same cause, which has been paid. The cause was tried to the court on a written stipulation without a jury.

The employment of the plaintiff in the particular service for which suit is brought is evidenced by cablegrams and letters of the defendant. In these communications, while requesting the services of the plaintiff in the defendant's behalf, nothing is said concerning the amount to be paid plaintiff therefor. As pointed out, the last service sued for was rendered in June, 1912. Suit was begun in February, 1916.

The Statute of Limitations runs against a foreign corporation, while keeping a general agent in the district. The statute provides:

"The period prescribed in the preceding section for the commencement of actions shall be as follows * * * Within six years * * * 2. An action upon a contract in writing, or liability express or implied arising out of a written agreement;" (Secs. 156 and 157, Rem. & Bal. Code.)

It is the defendant's contention that the letters and cablegrams of defendant containing no stipulation as to the

price to be paid plaintiff for his services, that the contract is not saved by the foregoing provision, but that the three years Statute of Limitations, concerning,

“an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument.”

for which provision is made in section 159, Remington & Ballinger's Code, applies, and that the action is barred.

The court is asked to treat as dictum that part of the decision of the Supreme Court of the State of Washington, in *Ingalls vs. Angell* (76 Wash., 692), relied upon by the defendant as not necessary to the decision and at variance with the decision of the same court in *Caldwell vs. Hurley* (41 Washington, 296, at 301).

On account of the conclusion reached, it will not be necessary to determine whether the three or six years Statute applies.

It is averred in the complaint that, from October, 1910, to June, 1912, plaintiff rendered services in the state of Washington as the ship's agent for the defendant. The evidence shows that Captain Jolivet, in June, 1913, became defendant's agent at Seattle, where plaintiff had formerly been employed in that capacity. The evidence tends to show defendant had no other agent in Washington than the plaintiff, prior to the appointment of Captain Jolivet. The complaint further avers, speaking of defendant:

“and during said three years last past has maintained and is now maintaining a general agent at Seattle, Washington, for the more convenient transaction of its business in said state.”

The Supreme Court of the state has held, in *Blalock vs. Condon* (51 Wash., 604 at 606), opinion by Judge Rudkin:

“Pierce Code, Sec. 291 (Bal. Code, Sec. 4807) (Sec. 167, Rem. & Bal.), provides as follows:

“The limitations prescribed in this chapter shall apply to actions brought in the name of the state, or any

county or other public corporation therein, or for its benefit, in the same manner as to actions by private parties. An action shall be deemed commenced when the complaint is filed.

"This court has uniformly held that the last clause of this section applies to actions by private parties as well as to actions by the state or its municipal subdivisions, and that an action is not deemed commenced so as to toll the statute of limitations until the complaint is filed, though it may be deemed commenced for other purposes by the service of summons and complaint. *Cresswell vs. Spokane County*, 30 Wash., 620; 71 Pac. 195; *Bay View Brewing Co. vs. Grubb*, 31 Wash., 34, 71 Pac. 553; *Service vs. McMahon*, 42 Wash., 452, 85 Pac. 33."

The statute further provides:

"Civil actions in the several superior courts of this state shall be commenced by the service of a summons, as hereinafter provided, or by filing a complaint with the county clerk as clerk of the court: Provided, that unless service has been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint." (Sec. 220, Rem. & Bal. Code.)

The foregoing admission in the complaint in the light of the evidence amounts to this: That it was plaintiff's claim that his own agency and that of Jolivet together extend back for more than three years prior to the filing of the complaint. Unless plaintiff could institute suit by service on himself, as agent of the defendant, there was no way for him to commence an action against the foreign defendant to obtain a personal judgment prior to the appointment of Jolivet as its agent.

The defendant's contention, insofar as the Statute of Limitations is concerned—that the provisions of the last quoted statute do not apply—does not commend itself to the court, because there is neither an exception to that effect in the statute, nor is any reason advanced for making such

an exception. In fact, reason would seem to indicate a contrary course. To file a complaint in a public office would tend to induce the foreign corporation sued not to appoint an agent upon whom service could be made.

“Where service is made upon an officer or agent who, although within the terms of the statute, sustains such a relation to plaintiff or the claim in suit as to make it to his interest to suppress the fact of service, such service is unauthorized. So service will not be sustained where it is upon a person who is party plaintiff, or plaintiff’s attorney in fact, or who is plaintiff’s assignor.” (32 Cyc., 554.)

The statute further provides:

“If the cause of action shall accrue against any person who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited after the return of such person into the state, or after the time of such concealment; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action.” (Sec. 168, Rem. & Bal. Code.)

The Statute of Limitations did not begin to run until the appointment of Jolivet, as defendant’s agent, in July, 1913. Such appointment affects the return of defendant to the state, so far as plaintiff’s right of action was concerned. The action being commenced in February, 1916, it was begun within three years.

The remaining affirmative defense is that of *res adjudicata* and, in particular, that phase of the doctrine of *res adjudicata* concerned with the splitting of causes of action.

In October, 1914, plaintiff brought suit against the defendant in the Superior Court of the State of Washington for services as ship’s broker, such services alleged to have been rendered between November 12, 1909, and January 5, 1912, at Seattle, Washington, and Vancouver, British Columbia. This suit was begun by process of garnishment

against certain amounts claimed to be owing the defendant by Balfour-Guthrie & Co., amounting to about \$1,000. The complaint in that suit averred the services to be worth \$1,000.

After suit was begun, the defendant appeared generally contesting the cause upon the merits, admitting the performance of the services, but denying the value as averred and pleading payment. Upon this issue, the cause was tried. Plaintiff recovered judgment against the garnishee as prayed, for \$1,000.

From the evidence in the present cause it is clear that plaintiff not only rendered services for the defendant during the time in question in connection with three certain law suits brought in Vancouver, British Columbia, but other services in addition, mainly in connection with proceedings for the adjustment of general average losses.

The evidence further shows that separate letters of employment covered the latter services; that separate statements of account were rendered on account of this latter service to the defendant. In rendering statements of account to the defendant, the latter services were always separately stated. The plaintiff made a separate effort to collect on account of his services in the general average proceedings through the adjuster.

The evidence does not clearly disclose the exact distinction in the services rendered by the ship's broker, for which the first suit was brought, and a ship's agent for which the present suit is brought. No case has been called to the court's attention directly upon the point of whether a suit begun by process of attachment or garnishment is *res adjudicata* of a subsequent suit in *personam*, barring the assertion in the latter suit of other similar items of services on account, due at the time the first suit was brought.

Sight is not lost of the fact that if the claim upon which the action is based is defeated in the proceeding in *rem*, the judgment would be *res adjudicata* of the same claim asserted later in *personam*. It is true that the writ of attachment or garnishment serves a double purpose:

It is not only a proceeding against the property, but the seizure, itself, serves to bring the defendant into court; but whether it will serve the latter purpose is, at the beginning, problematical. Therefore, a cause so begun is, until the general appearance of the defendant, one entirely in *rem*. If the defendant does not appear, the judgment is limited to the property attached, or garnisheed. There can be no personal judgment for the excess. The doctrine of *res adjudicata* proceeding upon the principle of estoppel, the estoppel must be mutual. Therefore, if at the beginning it would not do the plaintiff any good to assert any claim in excess of the amount attached or garnisheed, there would be no way to enforce the judgment in excess of such value—the reason for the doctrine of *res adjudicata* ceases to apply.

In beginning suit by such garnishment upon his entire claim, the plaintiff would be faced with the following uncertainties:

Defendant might not appear;

If it did not, any judgment in excess of the amount garnisheed would be idle;

If the defendant did appear, it might appear specially and attack the regularity of the garnishment;

If this attack proved unsuccessful, the defendant might abide the result, in which case any judgment in excess of the amount garnisheed would be of no benefit to the plaintiff.

If the plaintiff could not calculate upon benefit or advantage upon suing upon his entire claim, there would appear no reason for requiring him to undertake the labor and expense necessary to establish his entire claim. If the defendant appeared, generally, the plaintiff could ask to amend and set up his entire claim, but he might not consider himself in a position to assert it with safety. If he felt that he was in such a position, the defendant might plausibly object for the same reason.

In matters of amendment, the discretion of the court is well nigh arbitrary. The rule of *res adjudicata* should

not be left the sport of such a discretion. The reason for the rule in a suit in *personam* against splitting causes of action, in part, doubtless, is that the plaintiff should not be allowed, without benefit to himself, to injure the public by wasting the court's time and injure the defendant by putting him to excessive costs, needlessly. But in a suit begun in *rem* where the plaintiff may be wasting his efforts and means in asserting his entire claim, a reason for an exception to the rule appears.

The allegations of the complaint in the former actions were meager concerning the cause of action. There was nothing therein specifying the items of service for which suit was brought, the allegations simply being that, during a certain time, at certain places, "plaintiff rendered services as ship's broker to the defendant, at his special instance and request." No bill of particulars was required or given. It is, therefore, proper to look into the proceedings, aside from the pleadings, in order to determine exactly what was litigated.

It appears that the evidence given on plaintiff's behalf was confined to his services in connection with the general average proceeding and that judgment was given him therefor. The question was, therefore, in issue whether the services performed by plaintiff were those of a ship's broker, of which the judgment was conclusive.

There being no evidence as to whether the services for which plaintiff now seeks to recover were those of a broker, rather than a ship's agent, the precise point is not then in issue as to whether such services were those of a ship's broker or not. The term "ship's agent" is broader than "ship's broker." The latter might be included in the former, but not the former in the latter. The services for which claim is now made being those of an agent, and there being no evidence that they are those of a broker, the burden of establishing such fact, resting upon the defendant, has not been upheld.

Owing to these uncertainties, it is manifest that the more reasonable course to pursue is to hold that only those precise questions were determined in the former suit to which the court's attention was directed by the evidence

and arguments in the cause, and which were, upon such evidence and the pleadings actually considered, or absolutely necessary to its judgment, and not to hold the judgment conclusive of all matters that might have been put in issue by the pleadings.

23 Cyc., 1297; 1311, note 6;

Cromwell vs. County of Sac, 94 U. S., 351, 354.

Four witnesses for plaintiff, basing their opinions upon plaintiff's statement of the nature of his services, have testified that such services were worth from \$5,000 to \$7,000. Two witnesses for the defendant testified that they were only worth \$500 or \$600. Plaintiff testified that one year and eight months were covered by the services rendered and that the time actually occupied, if boiled down, would amount to one year, of eight hours a day; that, in 1909 he earned, in his business, \$3,000 or \$4,000.

Making due allowance for the interest of the plaintiff in testifying concerning the nature and extent of his services, upon which the experts based their opinions as to value, and also taking into account the success achieved by the plaintiff, I conclude that he is entitled to \$4,000, and the judgment will so provide.

(*Indorsed*;) Memorandum Decision. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Aug. 21, 1916. Frank L. Crosby, Clerk. By F. L. C., Deputy.

In the United States District Court, Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,	} No. 3241
vs.	
SOCIETE NOUVELLE D'ARMEMENT, Defendant.	

General Finding.

The court, in the above entitled cause, finds for the plaintiff in the sum of four thousand dollars, together with interest thereon at the rate of six per cent. per annum from the 6th day of June, 1912, until the 2d day of October,

1916, amounting to the sum of one thousand thirty-three and 33-100 dollars, in all the sum of five thousand thirty-three and 33-100 dollars. Defendant excepted to all the foregoing findings and its exception allowed.

EDWARD E. CUSHMAN,
Judge.

(*Indorsed:*) General Finding. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 2, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,	} No. 3241
vs.	
SOCIETE NOUVELLE D'ARMAMENT, a Corpora- tion, Defendant.	

Judgment.

This cause having come on regularly for trial to the court upon the issues of fact raised by the pleadings, a stipulation in writing by the parties having been theretofore filed in said cause waiving a jury, the plaintiff appearing by William H. Gorham, Esq., his attorney, and the defendant appearing by James Kiefer, Esq., its attorney, and the trial thereof having proceeded with the introduction of evidence on behalf of the respective parties, and the parties having rested, and the court having heard argument of counsel, thereupon the court, after duly considering the evidence and the law applicable thereto, and being fully advised in the premises, having filed its memorandum opinion on the merits in said cause; and the parties having joined in a request for special findings and neither party having served his draft findings or delivered the same to the clerk of the court for the Judge presiding at said trial, and the time within which the defendant as the losing party has under the Rules of this Court to serve its draft findings and deliver the same to the clerk for the Judge presiding at said trial having expired and the plaintiff having in open court waived his right to special

findings, and the court having found the issue for the plaintiff in the sum of four thousand dollars, together with interest thereon at the rate of six per cent. per annum from the 6th day of June, 1912, until the 2d day of October, 1916, amounting to the sum of \$1,033.33.

Now, therefore, upon motion of the plaintiff, the court being fully advised in the premises,

It is considered, ordered and adjudged, that J. R. Barnaby, the above named plaintiff, do have and recover of and from the Societe Nouvelle d'Armement, a corporation, the above named defendant, the sum of four thousand dollars, together with interest thereon at the rate of six per cent. per annum from the 6th day of June, 1912, until the 2d day of October, 1916, amounting to the sum of \$1,033.33, in all the sum of five thousand thirty-three and 33-100 dollars, and his costs and disbursements herein taxed at the sum of _____ dollars.

Done this 2d day of October, 1916.

EDWARD E. CUSHMAN,

Judge.

(*Indorsed:*) Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 2, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,

vs.

SOCIETE NOUVELLE D'ARMAMENT, Defendant.]

} No. 3241

Petition for New Trial.

To the Honorable E. E. Cushman, Judge of the above entitled court:

Comes now the defendant and petitions the court to set aside the judgment and decision herein and grant a new trial of this cause, for the following reasons and upon the following grounds:

I.

The amount allowed the plaintiff by the decision of the court herein is excessive and not justified by the evidence in the cause.

II.

That the evidence is insufficient to justify the finding³ of the court in favor of the plaintiff in this: that the evidence given at the trial established that the plaintiff's demand is and was at the time of bringing this action barred by the Statute of Limitations of the state of Washington, the action having been begun more than three years after the rendition of the last services sued for.

III.

That the evidence taken at the trial is insufficient to justify or support the decision of the court herein, in this: that the plaintiff on the 22nd day of October, 1914, commenced an action in the Superior Court of King County, Washington, wherein he was plaintiff and the defendant herein was defendant, being Number 104307, for services as a ship broker rendered between November 12th, 1909, and January 5th, 1914, to this defendant, and recovered a judgment therein on May 18th, 1915, against this defendant, which judgment has been fully paid and satisfied, and which judgment bars any recovery herein, it having been stipulated in open court that the words "Ship's Agent" as used in the complaint herein upon amendment should be deemed and taken to mean the same thing as "ship broker," in the complaint in the cause in the Superior Court, and said amendment should not prejudice defendant's plea of former recovery.

IV.

For error of law occurring in the trial, in this: that the court sustained an objection to the following question: (Q.) "Now, 1911, what were the receipts of your office?" propounded to the plaintiff upon cross examination.

V.

For error of law occurring in the trial, in this: that the court overruled the objection of the defendant to the testi-

mony of the witness, William H. Gorham, a witness on behalf of the plaintiff.

VI.

For error of law occurring in the trial, in this: that the court overruled the objections of the defendant to the following question propounded to the plaintiff: (Q.) "I will ask you if this bill was the basis of your complaint and recovery in the suit in the Superior Court?"

VII.

For error of law occurring in the trial, in this: that the court overruled the objection of the defendant to the following question propounded to the plaintiff: (Q.) "I will ask you if at the trial you testified in support of compensation for any services other than that involved in the general agency?"

VIII.

For error of law occurring in the trial, in this: that the court overruled the objection of the defendant to the following question propounded to the plaintiff: (Q.) "Did you, or did you not, testify in that case relative to receiving or not receiving instructions to render general average agency services?"

IX.

For error of law occurring in the trial, in this: that the court overruled the defendant's objection to the following question propounded to the plaintiff, a witness on his own behalf (Q.) "I will ask you whether, on the strength of that letter, you rendered a general average agency service?"

X.

For error of law occurring in the trial, in this: that the court overruled the objections of the defendant to the following question propounded to the plaintiff, a witness on his own behalf: (Q.) "And from whom had you expected to receive a check for payment of the bill?"

XI.

For error of law occurring in the trial, in this: that the court overruled the objection of the defendant to the fol-

lowing question propounded to the plaintiff, a witness on his own behalf: (Q.) "Were the acts whereby you discharged your function as a general average agent, the same acts whereby you discharged your function as a ship's agent in the matters you testified to this morning?"

XII.

For error of law occurring in the trial, in this: that the court overruled the objection of the defendant to the following question propounded to the plaintiff, a witness in his own behalf: (Q.) "When you brought the first suit, did you know that the defendant had an agent in Seattle upon whom service of process could be had?"

XIII.

For error of law occurring in the trial, in this: that the court overruled the objection of the defendant to the following question propounded to the plaintiff, a witness in his own behalf. (Q.) "Do you remember your counsel advising you as to the matter of the necessity of the court acquiring jurisdiction by service upon defendant?"

XIV.

For error of the law occurring in the trial, in this: that the court overruled the objection of the defendant to the following question propounded to the plaintiff, a witness in his own behalf: (Q.) "Did you state to your counsel at that time, that this corporation had an agent in Seattle upon whom service of process could be had?"

XV.

For error of law occurring at the trial, in this: that the court overruled the objection of the defendant to the introduction of evidence on behalf of plaintiff, upon the ground that the action appeared to be barred by the Statute of Limitations upon the face of the plaintiff's complaint, and in this: that the court permitted plaintiff to give evidence in support of his complaint over the objection and exception of defendant.

This petition is made upon the minutes of the court,

and the pleadings and files in the case, and the exhibits offered upon the trial.

Respectfully submitted,

JAMES KIEFER,
Attorney for Defendant.

(*Indorsed:*) Petition for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 9, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,	} No. 3241
vs.	
SOCIETE NOUVELLE D'ARMAMENT, Defendant.	

Order Denying Petition for New Trial.

In this cause the petition of the defendant for a new trial having been served and filed and submitted to the court for consideration.

It is by the court ordered and considered upon due consideration that said petition for a new trial be and the same is hereby denied, to which order the defendant excepts and its exception is allowed.

Done in open court October 16, 1916.

EDWARD E. CUSHMAN,
Judge.

O. K.—William H. Gorham.

(*Indorsed:*) Order Denying Petition for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 16, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,	} No. 3241
vs.	
SOCIETE NOUVELLE D'ARMEMENT, Defendant.	

Petition for Order Allowing Writ of Error.

The said defendant, Societe Nouvelle d'Armement, a corporation, feeling itself aggrieved by the judgment entered in said cause on the 2nd day of October, 1916, in favor of said plaintiff and against said defendant for the sum of five thousand thirty-three dollars and thirty-three cents (\$5033.33), and said plaintiff's costs and disbursements, in which judgment, and the proceedings leading up to the same, certain errors were committed to the prejudice of said defendant, which more fully appear from the assignment of errors which is filed herewith, comes now and prays said court for an order allowing the said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and provided, and also prays that an order be made fixing the amount of security which the said defendant shall give upon said writ of error, and that upon the furnishing of said security all further proceedings in this cause be suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals for the Ninth Circuit. And further prays that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and your petitioner will ever pray.

Dated this 7th day of December, A. D. 1916.

JAMES KIEFER,
Attorney for Defendant.

Copy of within Petition for Order Allowing Writ of Error received, and due service of same acknowledged this 7th day of December, A. D. 1916.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

(*Indorsed*;) Petition for Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,

vs.

SOCIETE NOUVELLE D'ARMEMENT, Defendant.

} No. 3241

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on this day to be heard in the courtroom of said court in the City of Seattle, Washington, upon the petition of the defendant, Societe Nouvelle d'Armement, a corporation, herein filed, praying the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors, also herein filed, in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

The Court having duly considered the same does hereby allow the said writ of error prayed for, and it is ordered that upon the giving by said defendant, Societe Nouvelle d'Armement, a corporation, of a bond according to law, in the sum of six thousand (\$6,000.00) dollars, the same shall operate as a supersedas bond and all proceedings be stayed, pending the determination of said writ of error.

Dated this 7th day of December, A. D. 1916.

JEREMIAH NETERER,

Judge.

Copy of foregoing order received and service of same acknowledged this 7th day of December, A. D. 1916.

WILLIAM H. GORHAM,

Attorney for Plaintiff.

(*Indorsed*:) Order Granting Writ of Error and Fixing Amount of Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,

vs.

SOCIETE NOUVELLE D'ARMAMENT, Defendant.

No. 3241

Bill of Exceptions.

Be it remembered that on this 14th day of July, 1916, this cause came on to be heard before the Honorable E. E. Cushman, one of the judges of the above entitled court, a jury having been waived by stipulation in writing, signed by counsel for the parties and filed in this cause, whereupon the following proceedings were had:

Mr. Gorham, counsel for plaintiff, moved to amend the complaint in the fourth paragraph, by erasing the words "Ship's broker," and inserting in lieu thereof "Ship's agent." The amendment was objected to by counsel for defendant, whereupon it was stipulated by counsel for plaintiff in open court, that the services sued for in the action referred to and set up in defendant's answer were rendered as a ship's agent, and that for the purpose of defendant's plea of former recovery the term ship's broker used in the complaint in the Superior Court and termed ship's agent in this cause, after amendment should be held to mean the same thing, and should not prejudice the defendant's plea of former recovery, and that such plea of former recovery or *res judicata* should have the same effect as though there had been no amendment, and thereupon the amendment was allowed. Counsel for plaintiff thereupon made an opening statement to the court embodying among other things the statement that plaintiff relied upon certain letters as evidencing the contract of employment, but containing no direct promise of compensation for the services and mentioning no sum agreed to be paid plaintiff, and that evidence would be offered of the reasonable value of the ser-

vices alleged to have been rendered by plaintiff. Thereupon counsel for defendant objected to the introduction of any evidence in support of the complaint, for the reason that it was apparent from the record that the action is barred by the Statute of Limitations of the state of Washington, and that it is apparent on the face of the complaint. After discussion and argument the court declined to rule, reserving the question for consideration on the final argument, and thereupon it was agreed between counsel in open court that all of the plaintiff's evidence should go in subject to this objection, and that the defendant should not waive it by offering testimony in its own behalf, and thereupon,

MR. BARNABY, being called as a witness on his own behalf, and being sworn, testified as follows: That his full name was Joseph Robert Barnaby; that he is the plaintiff; a resident of the state of Washington, and a citizen of the United States; a ship's broker and agent by occupation and had been for upwards of thirty years, in Liverpool, England, and in Seattle, and thereupon it was admitted on defendant's behalf that Mr. Barnaby was qualified in his business. The witness further testified: I have known the defendant since 1907; that the defendant had a ship here in 1907 and that was how I became connected with them; the ship had difficulty in regard to collection of freight, and her captain on behalf of defendant requisitioned my services; that they were apparently pleased with the way I handled the matter for them. It was in 1907 at the time of the financial panic, and defendant asked me if I would be prepared to represent them as agent in the Pacific Northwest, or in Seattle; defendant asked me for references, which I gave, and defendant looked up my record, were apparently satisfied with it, and gave me the agency of their ships here in the Pacific Northwest. I received communication from defendant with reference to its ship *Notre Dame d'Arvor*, and I produce cablegram of August 5, 1910, from Nantes, France, to Barnaby, Seattle: "*Notre Dame d'Arvor*, proceed to Victoria Vancouver can you recommend us an agent in." *Notre Dame d'Arvor* was a French steel bark, class 100 A1, owned by the defendant; to that I replied by cable, "August 6, 1910, Nove, Nantes, *Notre Dame d'Arvor* leave the business in my hands, shall

I arrange towage from Astoria, Barnaby." I received cable August 9, 1910, from Nantes, France, to Barnaby, Seattle, "Notre Dame d'Arvor, we leave the business in your hands cabled pilots Astoria order the ——— to Victoria please have there orders waiting outside to avoid expense and delay." Cablegrams offered in evidence as plaintiff's exhibit "1," "2" and "3"; I had a communication from defendant with reference to the litigation referred to in the complaint herein. Witness produces a cable from himself to defendant, dated Seattle, October 24, 1910, "Notre Dame d'Arvor, Retaining an absolute lien on the cargo, until freight is paid. Receivers claim consequence, cargo partially damaged and the balance discharged wharf unauthorized by them damaged \$18,500.00 Ship is arrested Vancouver. Please provide bail immediately Vancouver Ship now ready to proceed to loading port. Grain charterers threaten action in consequence of unexpected delay." The defendant replied to me by cable four days later, and I received a cable from the defendant dated October 25, 1910, addressed to me, "Arvor we consider action illegal we will communicate with London we will telegraph you again." I received cablegram from defendant of October 27th, 1910, addressed to me, "October 27, 1910, Arvor have given bail for \$18,500.00. Canadian Bank of Commerce consignees action illegal employ a competent lawyer claim indemnity." Signed "Nove," which is the defendant's telegraphic address, and the cablegram refers to the ship Notre Dame d'Arvor; witness produces cablegram from himself to defendant dated Seattle, October 28, 1910, "We have commenced action indemnity release before giving bail we are in communication with Balfours day by day Understand Balfours cabling you We advise do not make concession in loading days;" also produces telegram from defendant to witness of October 29, 1910, "Have given bail for \$18,500.00 in favor of Balfours Vancouver What is the reason Arvor not proceeding to Seattle We have not received communication Balfours' Will not make any arrangements Act accordingly with all possible vigor and dispatch."

"THE COURT: All these addressed to you here in Seattle?

A. Yes, Your Honor, all in Seattle."

The witness identified certain letters shown him and says they were received in the ordinary course of business and mail from defendant with due reference to the dates of the letters, and from the first letter dated October 29, 1910, addressed to witness subject Notre Dame d'Arvor, reads: "We confirm our letter of date as well as cable exchanged," and from last paragraph, "We have asked you to instruct the lawyer to act with all possible vigor and dispatch, as we are not going to make any concessions to the Messrs. Balfour. We are decided to fight the case out." Letter signed by "Poulet, director;" and produced and identified another letter of the same date addressed to Barnaby, subject Notre Dame d'Arvor, "We confirm cable exchanged, and feel much annoyed about all the trouble regarding the same," and three or four paragraphs down, "We have now given bail for the above mentioned amount by the Canadian Bank of Commerce, Vancouver. We expect that this will enable the vessel to proceed immediately to Seattle to load the wheat." At the end of second page, "Of course the captain has been in Victoria and Vancouver, and you are in Seattle, consequently it has not been easy for you to act in conjunction with him, but we think that your representative in those two ports ought to have kept us better advised about the ship's position. We trust you will succeed with the lawyer's assistance in getting the ship out of this mess and that you will if necessary take up legal proceedings in order to collect the freight and the demurrage due up to the date on which the vessel will be released, and be refunded of all the expenses incurred by the action. Please insist particularly on the bail being withdrawn as soon as possible." Signed "Poulet, Director." Various cablegrams and letters just referred to offered in evidence and admitted as plaintiff's exhibits "4," "5," "6," "7," "8," "9," "10," "11" and "12." With reference to the ship's formal agency in response to the instructions to act as agent particularly with reference to item in bill of particulars which refers to the Ship's agency as distinguished from litiagtion over the wheat charter party, the witness further testified: I instructed my agent at Victoria to give orders to the vessel before she entered the Columbia River to proceed to Royal Roads, Vancouver Island. The ship was bound originally to Portland, Oregon. The owners cabled

me saying they had arranged to deviate the voyage to Vancouver Island for orders, and asked me to see that the ship had orders given her while she was at sea so as to save expenses and delay in entering the Columbia River. I did that. The captain duly received my orders and proceeded to Royal Roads, Vancouver Island. In the ordinary course as ship's agent I interviewed the owners of the cargo and secured their evidence of title to the cargo; gave all necessary instructions in the usual way and that is about all there is to the ordinary agency of a vessel. According to terms of charter party the receivers of the cargo were to enter and clear the vessel at Victoria. As a matter of fact they failed to do so and I secured for the owners a refund of those fees. Greer, Coyle & Company, Victoria and Vancouver, B. C., acting for me, they being my agents, entered the ship. Subsequently there was a change of masters of the vessel before she entered upon her homeward voyage. I cabled to the owners recommending that the captain be retained in Vancouver as a witness; they agreed, and instructed me to appoint the first officer to take command of the ship, which I did and gave him written and other instructions which the Societe approved of, which the Societe wrote to me saying they "entirely approved of the instructions given by you to the new captain." The new captain signed bills of lading for the homeward cargo, but he was a young Frenchman, inexperienced, had never had command of a vessel before. I took him to the charterer's office and examined the documents, and told him to sign them. He signed them on my directions which was confirmed in my letter to the Societe and of which they approved. I alone passed upon the documents being in order. The captain took my orders. My agent at Vancouver cleared the vessel there. The charterers in Tacoma cleared her out of her wheat loading port under my directions. I accompanied the captain and saw him all through because he was a new man. The vessel sailed from Tacoma sometime in November, 1910, I think. Witness produces cablegram of September 10, 1910.

"THE COURT: They are a part of this second item; exhibits 4 to 12 concern this lawsuit. These you are bringing in, are they a part of that same transaction?

MR. GORHAM: No, these cables are with reference to the matter of the homeward wheat charter party, the first item in the bill of particulars.

Q. (The Court). They relate to items covered by exhibits 1, 2 and 3?

MR. GORHAM: Exhibits 1, 2 and 3, if the court please, regard ship's agency. This is in addition."

THE WITNESS: Cable from the Societe dated Nantes, September 10, 1910, to Barnaby, Seattle, "What is the present price of ballast Vancouver? What is the best freight you can offer?" I replied to that. Cablegram from the Societe, dated Nantes, September 13, 1910, to Barnaby, Seattle, "Arvor is chartered to Puget. Wheat to U. K." It is not expressed but it means that. "Arvor is chartered from to Puget wheat 27 shillings and six pence for 2240 pounds gross per ton of five hundred stiffening in Vancouver paying \$2.00 fifteen lay days the charterers are Balfours." Cablegrams just read by witness admitted in evidence and marked plaintiffs exhibits "13" and "14." Defendant consenting that bill of particulars be amended to include the exhibits. With reference to the homeward wheat charter, I interviewed Balfour, Guthrie & Company and made tentative arrangements for the loading of this wheat cargo, for the furnishing of the 500 tons of wheat stiffening. I advised the captain and I advised my agents in Vancouver and Victoria. I arranged for prices for lining the ship and furnished those to the captain as a guide to him because his ship was in Vancouver and she would have to be lined up in Vancouver by Canadian liners. I made all efforts to dispatch the ship from Vancouver so as to comply with the terms of the charter party of which I did not have a copy at the time, but Balfour, Guthrie & Company told me that they wanted it quickly to load as they had the wheat there in the warehouse and didn't want to have to pay storage. There was considerable delay with regard to the vessel getting ready for this wheat cargo. Then the captain, who could speak very little English, he was a Frenchman, a young naval officer, excitable, he said, "Five hundred tons of stiffening is not enough for my ship. I must have six hundred and fifty; you must get me six hundred and fifty tons of wheat stiffen-

ing." I said, "Well, your owners say five hundred tons." He said, "O well, they don't know anything about it. I must have six hundred and fifty." I said, "All right, Captain, I will try to arrange it for you." I interviewed Balfour & Company and endeavored to arrange this. They said they would consider it. Meantime I advised the owners of the captain's desire. Balfour, Guthrie & Company intimated afterwards they would supply this additional quantity. I said you had better give me that in writing, and we agreed on the price which was the same price as that for the five hundred. I informed the captain accordingly and informed the owners, that is, the Societe. The Societe meantime disagreed with the captain's desire for an additional quantity. I ordered wheat stiffening up from Seattle. It had to go up from Seattle. There was no wheat shipped from Vancouver at the time on sailing vessels. It had to go up from Seattle, six hundred and fifty tons instead of five hundred. When the six hundred and fifty tons got alongside, the captain said, "I will take five hundred tons, I don't want any more." "Yes, Captain, but your agent has arranged for six hundred and fifty tons." "I don't want it: take it away." The charterers, Balfour, Guthrie & Company had this additional stiffening thrown back on their hands. The Societe had rapped the captain over the knuckles for asking for additional wheat stiffening. The wheat was rejected and sold for account of whom it may concern by Balfour, Guthrie & Company, that is the excess. I mollified Balfour, Guthrie & Company to such an extent as to induce them afterwards to relieve the ship and the owners and myself of all liability for the additional expense to which they were put. All this took place exclusively in Seattle. My dealings with Balfour, Guthrie & Company were in Seattle; with the Societe by cable from Seattle; my communications with the captain were by letter from Seattle, and partly oral, he came down to see me. I did not visit Victoria during this time: it was done in Vancouver. I kept a diary of the transactions of this ship which I have; the entries in that diary were made on the dates of the several events.

MR. GORHAM: You may refer to the diary, Mr. Bar-

naby, for such further matters—refresh your mind as to the facts with reference to the wheat charter party if there are any.

WITNESS CONTINUED: The ship should have been down in Tacoma to load her wheat cargo; she was delayed on account of the lackadaisical manner in which the Societe fulfilled their obligations to the court in Vancouver; the wheat charterers here in Seattle, Balfour, Guthrie & Company, notified me in regard to the matter. Witness produced letter from Balfour, Guthrie & Company, dated September 14, 1910, addressed to J. R. Barnaby, Seattle; letter offered and admitted in evidence and marked plaintiff's exhibit "15," and read. The ship was delayed and the charterers threatened action for non-fulfilment of the terms of the wheat charter, and I deemed it necessary, owing to the actions of the captain, the lackadaisical manner in which he was attending to the owners' interest, I deemed it necessary to station a special representative on board to hurry that ship on the way down to Tacoma to get her cargo, directly the bail from France enabled her to leave Vancouver. On the same day that the bail arrived in Vancouver, I had that ship clear, the tug arranged for—everything else—put a hustle on and had her brought down to Puget Sound. I told my man to be sure she swung into Port Townsend up past quarantine. Because other vessels had previously come right down to Seattle from Vancouver and had been ordered back to Port Townsend, and I didn't want to have that delay with my ship, and she didn't have it. The time was so vital, because the circumstances were so strained between the Societe or the captain and the wheat charterers. Therefore she got down to Tacoma in short order. The wheat charterers were also consignees of the outward cement cargo discharged at Vancouver. My representative in Tacoma stayed by the ship, went ashore, made all arrangements to get her alongside the berth, and start loading. Through his efforts and the good will which we had with Balfour, Guthrie & Company at that time, we got that ship loaded in record time. Within two days that ship was loaded fully with the cargo of wheat, three thousand tons. The time of her lay days under the charter party, that is the time which the char-

terers had to load her was fifteen days. I saved the Societe the thirteen days in loading that vessel; the value of that time even at the low rate stipulated in the charter party, three pence per registered ton, amounts to \$1759.00. I put a general hustle on, and got the ship through the customs and the French consulate, and introduced the captain, and personally attended to it, so as to get through and go on; took him up to the charterers' office, had the documents signed, put all the documents in order, and had him ready to get to sea. The vessel was in possession of the marshal of the British Columbia courts at Vancouver after she was fully discharged, and after some of the stiffening had been put in. There was a delay at Vancouver of approximately two weeks when she was ready with the stiffening to proceed to Tacoma. During that period I was partly in Vancouver, and partly in Seattle getting a move on, and when I wasn't in Vancouver my representative was. I had occasion to send to Balfour, Guthrie & Company's office probably a dozen times at any rate during that period. After the vessel was loaded and ready to clear with her wheat cargo, I was requested by the owners to secure advances on freight on the wheat charter party. The original captain was so neglectful of his services that he failed to have sufficient money here to defray the ship's port expenses. I told him to have sufficient money here on Puget Sound to have no hitch, he says, "That is alright; that is alright," but when it came time for the ship to proceed to sea there was not enough money to cover her port expenses. The bills of lading were signed; there was nothing else to do but cable the owners to remit a sufficient sum to cover those. They cabled me to take a freight advance, to obtain cash on the wheat bills of lading. I went to Balfour, Guthrie & Company; they said, "No, we have had so much trouble with that captain; we will do it for you, but not for that captain; we won't have any more bother with it." The charter party was made in London; they did not advance freight; I cabled to the owners, "too late to get freight advance as bills of lading signed five days ago. Please remit immediately twenty-five hundred dollars to cover balance ship's disbursements. Ship waiting." I wanted to get the ship away to sea; it would cost money to keep the ship in port.

They replied, "Twenty-five hundred will be sent to you by Henry, San Francisco." That money came to hand in due course and the ship's port expenses were defrayed and she went to sea. When the owners received my letter showing what quantity of wheat the ship had loaded, they wrote back to me saying they were disappointed in the quantity—this ship had only approximately three thousand tons—that on a previous voyage from Astoria she had loaded three thousand three hundred tons; they were losing the freight on three hundred tons they thought, and they wished me to investigate and report. I did so; I found out what quantity of wine she had on board, stores, coal, water, and added everything up in the way of cargo, examined the load line, knew what her draft was forward and aft, thought the thing over, consulted the old captain in regard to that; and eventually it developed that the ship's load line had been altered from the time she loaded the cargo in Australia some year or so previously, three thousand three hundred tons. There was a different load line then to what it was. That was the real explanation of why the ship loaded three hundred tons less on this occasion. I closed my investigation and informed the Societe. With reference to the litigation in British Columbia, the Societe had placed themselves in rather a bad position by not having made proper arrangements in regard to the damaged cargo which was coming out of the ship through a previous accident which had been in the courts in London, and when the libellants there were not the receivers. This cargo had been sold several times. When the libellant had arrested the ship on October 21, 1910, I advised the Societe by cable to arrange for the bail to be put up; they instructed me to fight the case and act vigorously. (The Court) This is another fight? (Mr. Gorham) No, this is the same matter; we have the cablegrams in evidence. (The Witness) The libellants were Hind, Rolph & Company, of San Francisco, and Parrott & Company of San Francisco. Hind, Rolph & Company were the original charterers of the ship, although they parted with their rights subsequently; Parrott & Company had no documentary connection with the damaged cargo on the ship, but they presumably had some, because they and Hind, Rolph & Company jointly libeled the ship October 21, 1910, for

damaged cargo and improper delivery. As soon as I received the Societe's instructions I proceeded to Vancouver. I pretty well knew that I was up against big interests, the biggest interests on this Pacific Coast, Balfour, Guthrie & Company; Hind, Rolph & Company; Parrott & Company; R. V. Winch & Company, all millionaire firms. As far as my knowledge went, there was only one firm of maritime lawyers in British Columbia, the firm of Bodwell & Lawson. I found that the libellants had engaged them, so I did the next best thing, I went to a firm of highest repute in Vancouver, Russell, Russell & Hannington, and had a consultation with them. They arranged to take the case for me; they were to be responsible to me only; they were to take my instructions, Mr. J. A. Russell, the senior member of the firm said. It was necessary to furnish these gentlemen with advice to sustain our position in regard to charter parties and bills of lading and maritime custom and usage, for the reason that they had not had much experience along these lines and I arranged with them that I would get at the case, but they would look after the legal end of it. The lawyers on the other side deferred, protracted our case, and it ran along with interviews; we made up a counter-claim for lien charges. Our ship in the mean time, under my instructions, had, that is, prior to the arrest, our ship had placed a lien on the cargo for the recovery of freight, because the receivers of the cargo, the people who had title to the cargo, refused to pay the freight. They said "That cargo is damaged; we will not receive it; if you want your freight you must place a lien on the cargo." I endeavored to get them to alter their views but it was impossible, so a lien was placed on the cargo and the ship was arrested and hence that litigation in British Columbia. They blocked us all they could, we went ahead with our case; but we were the defendants, Your Honor, so we merely had to wait their time. They were plaintiffs. I furnished my attorneys with explanations of the various clauses in the bills of lading and charter parties, examined the survey reports, examined the circumstances of the two collisions in England, which really were the reason of the damaged cargo, so that we could contest and refute the plaintiff's allegation that our ship was responsible for the damaged cargo. I

made up the counterclaim with my attorneys' assistance; this ran our case along to December; I was in Vancouver all the time; I informed the Societe; I was in Vancouver all the time on this litigation and let my business in Seattle go; from October 29th well into the next year; I informed the Societe that it was necessary to concentrate all my attention; they asked me to give it my undivided attention; I informed them that I was in Vancouver and would stay there and force a conclusion if possible. Then along in December the libellants entered an action in another court for the recovery of the cement which we held under a lien for freight; we held that cargo under lien for freight. The libellants instituted another action for the recovery of that cement; instead of instituting the action in the Admiralty Court, they instituted it through the Supreme Court. There were some little difficulties there; I instructed my attorneys to defend that action; we got through with that favorably to the Societe; then in the same month, December, another of the consignees, R. V. Winch & Company, libeled the ship for wharfage, which they were clearly not entitled to in my opinion; I got together evidence on that point, had examination for discovery made. That case was postponed along in January, 1911, with the result that the libellant in that action withdrew his claim, and we, the Societe, won our point in that also. We were defendants in all these three actions. The result of the libel by Parrott & Company, and Hind, Rolph & Company, against the Societe was judgment in favor of the Societe, and we received judgment on the counterclaim also. As to the deviation, "The charter party was one agreement, the bill of lading another; the bill of lading being the last document signed, it is a custom in maritime law that that nullifies the operation of the charter party. That was one difficulty, or one advantage, one thing we had to consider. Then, on top of that, there was a deviation of the voyage, which brought about another agreement, and that caused some complication and a great deal of thought with regard to what our position would be in regard to this damaged cargo.

Q. Is this all affecting this litigation, you mean?

A. Yes. I went into that, and instructed counsel as

to my views. I advised them as to what the meaning of the cessor clause in the charter party was, where the charterers' liability shall cease on the shipment of cargo. These were all points which were necessary for the successful operation of our defense against the libellants. I cabled to the Societe for the deviation agreement. They had not furnished me with it, but simply told me that the voyage had been deviated. I got that in due course, furnished it to counsel. Then it developed, when we wanted to go to trial, it developed that the libellants for damaged cargo and improper delivery refused to admit that there had been a collision in the English Channel, or that the cargo was damaged as a result of that collision; and my attorneys advised me that it would be necessary to send a commission to England to get evidence on that point. Of course I could see that this was costing my clients, the Societe, a lot of money, all this delay; and I protested very strongly in an interview, to get that question waived. And I told my attorneys that they should try to get the attorneys for the libellants to agree to accept an authenticated copy of the London judgment as evidence of that collision in the English Channel. The attorneys for the libellants would not agree, but eventually did. But the Societe, instead of responding to my request for an authenticated copy of the London judgment, simply sent out a stenographer's copy, and thereby held us up several weeks more. It was their expense; it was their case; it was their laxity that we were further detained. So it became necessary to wire for a further authenticated copy. The libellant's attorneys accepted this as evidence of the collision, but they sustained their objection that the ship was still responsible for damaged cargo. I have had some experience in Liverpool, having studied naval architecture, and I found that the water, at the second collision, had not touched the cargo, but had trickled down the inside skin of the ship, had gone down into the well of the ship, that the floor was over three feet above the well of the ship, that this water had congregated, and we put in proof to show that the ship was not responsible for the damaged cargo. And, before the ship sailed from Puget Sound I ratified and fortified and reenforced our position in that respect by getting the members of the crew to appear

before a Notary in Seattle and state what were the facts. That also was put in evidence at the trial in Vancouver, B. C. and Victoria, B. C. The trial was further adjourned by the Judge having to go away to California. The attorneys later on seek to get an adjournment of the trial to August of that year. I stayed by it, Your Honor, and speeded up the case, and got our trial brought on before the Admiralty Judge in Victoria, on or about April 18th, 1911. About four days approximately was consumed in the trial, as far as I can remember; I was present, and was a witness; we expected to get through in two days but when the captain was put on the witness stand it was impossible to understand him; the Judge said the only thing to do was to adjourn the trial for another week or ten days and it would have to be heard in Vancouver; it was in Victoria then. The fact of the captain having been in a measure incompetent in those respects, threw a great burden on myself in sustaining the Societe's rights; in giving evidence and directing the case in all respects. The case therefore was adjourned to Vancouver for May 2nd, 1911, after the captain had been on the witness stand in Victoria. In Vancouver, the examination of the captain was resumed, I promoted and furnished my counsel to the best of my ability on these expert and technical matters; I appeared as a witness in support of our claim and the Admiralty Judge reserved judgment. Certified copy of the judgment of the court in the Parrott & Company and Hind, Rolph & Company's suit against the Notre Dame d'Arvor, referred to in the evidence of the witness on the stand, and also the report of the district registrar upon the reference provided for in the judgment offered in evidence.

Documents admitted in evidence and marked plaintiff's exhibits "16" and "17."

Counsel for plaintiff calls the court's attention to the following lines in the judgment, "I turn then to the question in dispute, the determination of which has been far from easy and has occupied much time. It is not necessary to refer to what happened in Victoria, where 6029 barrels of cement were discharged, other than to say that the actions of R. V. Winch & Company, Limited, and of Bal-

four, Guthrie & Company, from whom Winch & Company had bought the cargo, in regard to the bills of lading and general average bond were so unbusinesslike and irregular that Captain Pichard, master of the vessel, was fully justified in forming the opinion that he would have to be careful in dealing with them in future, and stand by his legal rights, which he had waived in a very accommodating manner in Victoria, relying upon the letters of Balfour, Guthrie & Company of the 1st and 6th of September and telegram of the 8th, which, in view of the evidence of Freer and testimony of Barnaby, must be given full effect to and cannot be explained away."

(THE WITNESS): I wrote letters to Balfour, Guthrie & Company, the consignees and receivers, and got the captain to sign them, in accordance with the world custom. The essential letters were my letters in accordance with the world custom and the captain signed them. They were in reference to fixing the responsibility of Balfour, Guthrie & Company, in the first instance, that is, before the litigation took place; they were put in as exhibits. The judgment was given in this case in July, 1911; my attorneys in Vancouver advised me and I notified the Societe; they dropped me like a hot iron. After the rendition of the judgment by the court a reference to the registrar was made to assess damages; I rendered affidavits to my attorneys, furnished them with information to sustain the amounts of the claims and interviewed them on several occasions; speeded the matter in all manners possible in response to the instructions of the Societe.

MR. GORHAM: "And the registrars report in evidence if the court please, shows that the Societe owner of the vessel, recovered on its cross demand or counterclaim as follows:

"Now, I do report that I have carefully examined the accounts, vouchers and proofs brought in by the defendant in support of her claim, and having read the two affidavits of Mathieu Picard sworn to on the 9th day of August, 1911, and the affidavit of Joseph R. Barnaby, sworn to on the 27th day of November, 1911, and having heard counsel on both sides, I find that there is due to the defendant the sum of \$4,258.34, as stated in the schedule hereto annexed."

(The Witness). In addition to the \$4,258.34 we recovered the whole freight due the ship, approximately about \$7,000.00.

THE COURT: That is the total amount, the counterclaim and all?

A. No; the total amount of freight. They paid us \$5,000.00 in Victoria. The remainder they have not paid.

Q. Between the time you arrived in Vancouver and the time of the registrar's report, did they pay any freight?

A. They did.

Q. When, with reference to the institution of these suits?

A. While this litigation was pending, they found they were in error and came forward and made a tender of freight.

Q. How much, approximately?

A. \$4,936.00.

Q. Was the freight accepted?

A. Eventually, yes.

Q. (The Court). You recovered the \$7,000.00 in place of the \$4,936.00 tendered.

A. Yes, Your Honor. All freight was finally recovered: and we recovered demurrage and damages.

THE COURT: Was the damage in the counterclaim?

A. Yes.

Q. (Mr. Kiefer). Was it part of the \$4,200.00?

A. No, the demurrage amounted to about \$1,600.00.

Q. (The Court). In addition to the \$4,258.00?

A. Yes, Your Honor.

Q. (The Court). \$1,600.00 more?

A. I beg your pardon, I think the \$1,600.00 was included in that \$4,258.00.

Q. Well, the registrar's report an allowance of \$4,258.00. The first item is balance of freight.

A. Yes.

Q. The other items going to make up the total exclusive of \$701.93, are for what is shown by the registrar's report?

A. As shown by the registrar's report.

Q. Other items are the captain's salary and expenses?

A. Yes. The captain's salary and expenses were recovered in addition to this \$4,200.00. It was put in as costs, \$2,500.00, and \$701.00 freight. There was really an excess by reason of the libellants having failed—

Q. Take your diary, if you can, and from your diary tell the court what extent of time you were occupied in this litigation—you were personally occupied—in British Columbia.

A. Well, the whole period covered a year and eight months. But if it could be—that service was intermittent in that year and eight months—but if it could be concentrated and put boiled down into an ordinary working day of say eight or ten hours, it would occupy probably twelve months of time.”

THE WITNESS: After the libel and arrest of the ship in October, 1910, I went to Vancouver and remained in Vancouver continuously until a couple of days before Christmas, and was continuously engaged from day to day in the direction of the litigation on behalf of my clients; it was absolutely necessary owing to the nature of the case, and the technical matters involved. I forwent all my other business so as to give this case my undivided attention according to the request of the Societe. I returned home Christmas, and went again to Vancouver early in January, about the 5th, and remained in British Columbia until about the end of February, and during all that time was reenforcing our case, going into the matter of the wharfage action, which had been continued over into January, getting the London authenticated judgment from the owners, and the deviation agreement. During that period from January 5th to the latter part of February my time was wholly and exclusively occupied in attending to the supervision of this litigation on behalf of my client, because we were expecting our case to come on; we re-enforced and strengthened the case. I came back to Seattle in February and went back to British Columbia in March; remained for a few days; came back to Seattle, because the case had been adjourned; then our attorneys advised me it was necessary to meet them at Victoria, which I did about April 18th, 1911, for the purposes of the trial. Just about at that particular time I had buying orders for seven thousand steel drums, that is the business I am

engaged in; this trial was coming right on; my mind and attention were so concentrated on the success of the litigation of the Societe, that I set aside the steel drum contract, which was all but closed; on that contract my profit would have been \$7,650.00; I had the buying and selling of that arranged; had the buying order; I lost that contract. At the time this litigation was in shape, it had been passed upon and the contract had been drawn between the parties. During all this period from October until April, I was in communication with the owners by cable and mail, and you will find in their letters they commended me right through. The correspondence was continuous; the volume of all the correspondence would run into hundreds of letters, or a thousand, or more. During this period from October to May, it was very voluminous and the Societe wrote, "Keep us well posted: we trust you will do your best to carry the case through;" that was all by letter.

MR. KIEFER: I object to that, and move that it be stricken out.

THE COURT: Objection sustained.

We advertised the cargo for sale; wanted our freight; were entitled to it; and an action was brought to restrain us from doing so. The libellants said they were willing to give us a bond satisfactory so as to guarantee our freight; we said that is all we have been asking for. The writ was issued and the libellants paid all costs. The libel of Winch & Company against the vessel for salvage was dismissed upon libellants' motion, and the ship recovered its costs in that suit.

THE COURT: They paid the costs of all actions?

A. They did, sir.

In the replevin suit the court granted the application for the writ upon motion and the ship's representatives said that this bond to pay the freight was all they wanted, and the court imposed the costs upon the plaintiff in that case. The amount of the bond was \$24,000.00 for freight and damages and detention. As agent for the ship under instructions as they have been introduced here from my principal, the Societe, the defendant in this case, I took the initiative and directed the defense in the litigation. It was done by me, my counsel assisting me. The receivers

of the cargo wanted to pay us only on 398 pounds per barrel under the bond they had given, only a short number and found they had agreed to pay duty in a large amount; of pounds per barrel. I went to the custom house and I said, "We are entitled to freight on the larger amount." And we got it. The difference of four pounds per barrel, a difference of 396 pounds per barrel and 400 pounds per barrel on 17,000 barrels of cement. I alone prepared the brief of facts for the solicitors and barristers on behalf of the shipowner, the French Societe, at Victoria. I jointly with my counsel consulted the witnesses and determined the materiality of their evidence and their knowledge of the facts; I directed the former master of the vessel who brought the vessel out from England; I determined upon his remaining and directed him to remain. I had full authority and discretion. I rendered a bill for my services in the matter of this litigation, ship agency, on the 31st day of March, 1913; I made a request for the payment of the bill as rendered; I have not been paid either directly or indirectly; I consider \$5,000.00 the reasonable value of my services.

Cross Examination, by Mr. Kiefer.

The amount of the bill was \$10,000.00; I changed my mind as to the amount we should claim in court here. In March, 1913, I did not think my services were worth twice what I now think they were; I still think they were worth \$10,000.00; I thought I would be more modest; on consultation with my counsel I decided I would be modest about it—you used the right word—and I would ask for a reasonable sum and I placed that at \$5,000.00.

THE COURT: When was the suit brought?

MR. KIEFER:.. *In February of this year.*

THE WITNESS: I would rather be modest about it.

Witness shown bill and says, "that is my bill." I claim that I rendered services as set forth in our complaint, from October, 1910, to the 6th of June, 1912, one year and eight months. The circumstances related in the bill are covered by the period which we claim for; this thing might have been a great deal fresher in my mind when I made out my bill in 1913, than it is now.

Q. And at that time you considered that your services ended in the month of April, 1912?

A. Well, it may have been a typographical error, I stated the services.

Q. But you say you never rendered any services after the month of June, 1912?

A. We are not suing for any after June, 1912. For the purposes of this suit, my services closed up in June, 1912. I have been in business in this city in ship's agency and brokerage upwards of ten years. I rendered only services as ship's agent to the Societe in the year 1910, to no other shipowner that year; I rendered no ship brokerage services to any other than the Societe in 1910, likewise in 1909. In 1909 the total net income of my office from all sources for the year 1909 was probably three thousand or four thousand dollars after paying operating and office expenses. The total net income of my office for the year 1910 excluding the services to the Societe was three or four thousand dollars. "Now in 1911, what were the receipts of your office?"

MR. GORHAM: We object.

THE COURT: Objection sustained.

MR. KIEFER: That is the year in which your principal services is claimed to have been.

THE COURT: Objection sustained because according to his testimony so much of his time was taken that he was not paid for that it cannot be any guide.

WITNESS: My business relations were unsatisfactory and broken by this matter coming along.

MR. GORHAM: You mean your business relations with other firms?

A. Yes, here in one instance I lost a profit of \$600.00 or \$700.00."

THE WITNESS: I told you I got a lot of dispatch in the loading of this vessel with the outward bound cargo of wheat. I didn't pay the stevedores anything for this expedition, they got their ordinary rates for whatever overtime they occupied, paid them the ordinary going wages for their work; had to pay overtime for night work, but nothing beyond the customary charges.

(Recess until 2 p. m.)

At 2 p. m., J. R. Barnaby recalled. Redirect examination by Mr. Gorham:

Witness shown letter from defendant to himself, dated February 10, 1911; I have seen it before and received it on the 24th of February, 1911, in the due course of mail.

(Letter offered in evidence and admitted as Plaintiff's "Exhibit 18.")

Witness read paragraph as follows: Notre Dame d'Arvor. From document we have received from you, we recognize that you have well prepared the case for the lawyers, and even if they are not acquainted with maritime affairs, they will no doubt grasp the full situation." Witness shown letter dated March 25, 1911, from defendant to himself and says it was received April 8, 1911, in due course of mail.

(Letter offered in evidence and admitted as Plaintiff's "Exhibit 19.")

Witness reads therefrom: "Notre Dame d'Arvor. We note how you have established our claim against the receivers of the cargo, and same has our entire approval."

Witness shown letter addressed to the defendant without signature, dated March 21, 1913, with statement attached, and says that is the letter covering his account for these services, and that it is the original carbon copy remaining in his office since forwarding the letter, and is a true carbon copy of the original. Looks at statement attached and says that is a copy of his account mailed to the Societe covered by this letter; account for services rendered in the connection for which witness is now claiming under the complaint in the suit at bar; that the bill is for \$10,000.00. (The Witness). I subsequently received an acknowledgement of that letter from the defendant.

(Papers and letters referred to by the witness offered in evidence and marked Plaintiff's "Exhibit 20.")

As to collection of freight on the cargo, witness testified:

The receivers of the cargo neglected to pay the freight, and I made repeated efforts to get them to make payments. The cargo continued to move off the dock and we placed a sort of friendly lien upon it, and that was disregarded, and the cargo still continued to be moved off

the dock and out of the custody of Balfour, Guthrie & Company, and out of the custody of R. V. Hinch & Company, until finally we were compelled in the interests of the Societe, to assert our lien. The efforts to get this freight, Your Honor, were very trying and embarrassing, especially dealing with such a high-class firm as Balfour, Guthrie & Company. They just deferred the matter from time to time until it got to a breaking point, and we had to do something so as to protect the Societe's interests. This trouble covered the period from September 1st, until about the end of November, when they came along and made tender of part of the freight.

Cross Examination.

I closed up my office in Seattle from October, 1910, to April, 1911, so far as my own particular services are concerned. My son was in my office in Seattle and advised me of everything that came along in the meantime. I made very few visits here; was not able to at all to my satisfaction to keep a hand on business here; as a matter of fact I have cited one point in which I lost \$6,650.00 on one transaction.

HUME B. ROBINSON, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

On Direct Examination by Mr. Gorham.

My full name is Hume B. Robinson, residence Vancouver; occupation barrister-at-law, which I have followed since 1898. I have been a member of the bar of British Columbia since 1909; that is my exclusive occupation. I know Mr. Barnaby; was a member of the firm of Russell, Russell & Hannington until December 31, 1911. The litigation ended in May, 1911, but not altogether, the registrar's report was not in until the following January, 1912. There was a reference afterwards under the judgment of the court.

THE COURT: It was June 12th. He gave the date.

MR. GORHAM: June 12th was the last day in the complaint, but I think the account shows that the last service was rendered in April or May.

MR. KIEFER: April 12th.

(The Witness). I heard Mr. Barnaby's testimony this morning and this afternoon here in court, and remember

the litigation he has related; I was solicitor in the matter of that litigation for the defendant company, and Mr. J. A. Russell, Sr. member of our firm, was counsel. Mr. Barnaby consulted with both Mr. Russell and myself; as far as I remember we were in constant consultation with him during the whole litigation, taking his advice herein; he represented the owners and of course we took instructions from him. I can't answer on behalf of Mr. Russell, but I know that for instance in the preparation of the statement of defense—in our courts we go very much on the pleadings filed in court during the progress of the case, and on our files—we can't go outside of our pleadings. Therefore the pleadings are a very important matter. The statement of defense in this case was a very important matter, and it was prepared by myself with Mr. Barnaby's assistance; and Mr. Russell of course passed upon it before it left the office. And throughout the whole, the same thing would apply to all steps in the case, throughout the case. We were always with Mr. Barnaby or Mr. Barnaby's agent. There was no other person upon whom our firm relied to guide and direct us in the prosecution. I have heard Mr. Barnaby testify as to the nature and extent of the services and so far as I know it was a correct statement. Of course the matter is five or six years old and I can't remember this perhaps as clearly as Mr. Barnaby can. But I remember this part, that Mr. Barnaby was in constant communication with us during the whole period of the litigation, either by letter or by personal attendance. And I remember we were well into the spring of 1911, from say January until the date of the trial—I think the date of the trial was the latter part of April or the first of May—and I think Mr. Barnaby was there all the time. He evidently thought he was up there all the time from necessity for the interest of his owners; I think so, because it was a peculiarly involved litigation; it was a litigation which was different from what we had had in our maritime courts before. When I was there we had several demurrage cases, but they were all cases of collision, which were comparatively simple matters.

THE COURT: I haven't got clearly yet, what the points in issue were.

MR. GORHAM: If Your Honor please, that is probably because this vessel passed through two casualties before she ever reached the west coast of America; and it was by reason of those casualties that a large part of this complication arose after the vessel arrived at British Columbia. She came into collision, in the English Channel, with the ship Raithwaite. She was obliged to go into port and discharge her cargo and have repairs. Suit was brought against her and the d'Arvor recovered some \$40,000.00—successfully resisted the Raithwaite case, and recovered against the Raithwaite some \$40,000.00. I think 8,000 pounds damages, resulting from the collision. She then started to go on her voyage with this cargo of cement, and came into collision with the breakwater off Falmouth and was obliged to put back into port and discharge her cargo and dock again; all of which required a considerable disbursement upon the part of the owners of the vessel and the other interests involved, all of which was subject to general average after the vessel arrived at her port of destination and discharged the cargo, which was after the vessel had deviated from her voyage to British Columbia. That all followed after the vessel arrived—the suit of Hind, Rolph & Company and Parrott & Company for damages to the cargo and then the complications arising from the failure to pay for freight. That is practically correct, is it not, Mr. Robinson, as you understand it?

A. As I understand it, yes.

Cross Examination by Mr. Kiefer.

When Mr. Barnaby rendered these services I was more or less familiar with what he was doing. I cannot remember that he was in Victoria and Vancouver continuously from the latter part of October until the latter part of December, 1910; I wouldn't like to say that. I know that we were successful in the prosecution of the litigation, and we thought it was due largely to Mr. Barnaby, that is my personal opinion. I found him very thorough, extremely so; I wouldn't like to say that he went into more details than I at the time thought necessary; we found that detail of great advantage to us. The case was unique in many ways, both to Mr. Russell and myself, and we had no precedent to work on. If you go through

our reports you wouldn't find a similar case in the reports. The local judge referred to the great difficulty he had in finding precedents. It was technical assistance we could not get from any one we knew of except Mr. Barnaby. Lots of ships might have agents here who would not have the high skill and experience that Mr. Barnaby had, and we drew upon that to the best of our ability.

WILLIAM HARVEY COPP, a witness sworn on behalf of plaintiff, testified as follows upon

Direct Examination by Mr. Gorham.

My full name is William Harvey Copp; am a retired ship master; followed the sea over sixty years, in the waters of the world, especially between 60 south and 60 north; sail and steam; built ships for many years; in New Brunswick, St. Johns and Bay of Fundy; all deep water ships; managed ships I built, went to sea with them; was managing owner of them, and went to sea, and chartered them. I reside in Vancouver at the present time; have been nautical assessor in some cases for the government about seven or eight months ago, and am pilot commissioner in the port of Vancouver; have had any amount of experience with litigation in reference to ships and shipping; have had my ship seized in New York and litigation involving ships I owned in and sailed. Was in court and heard the testimony of Mr. Barnaby on the witness stand in this case this day. As to the reasonable value of the services rendered by Mr. Barnaby to the owners as detailed by him on the witness stand, there seems to be a good deal of litigation in connection with it and a great deal of trouble, and I think his services should be reasonably worth between \$5,000.00 and \$6,000.00. I think that amount would be none too much for the trouble he has taken, as far as I can remember it. I don't know of any other ship's agents in British Columbia who could have discharged the services that Mr. Barnaby did for his owners.

Cross Examination by Mr. Kiefer.

I have prepared cases similar to this for trial, but not in connection with collisions, but I have prepared cases where they said I contracted to do an impossibility. In

Australia I remember one case in particular. I had the Harbor Commission against me and had everybody against me.

(Witness excused.)

JAMES R. STUART, a witness sworn on behalf of plaintiff, testified as follows: upon

Direct Examination by Mr. Gorham.

My full name is James R. Stuart; residence in Vancouver, B. C. I have been connected with ships and the sea since I was 14 years of age; have held a Master's certificate since 1881, a British Board of Trade certificate; includes both steam and sail, and everything else; I followed the sea about 40 years, six years in Vancouver and handled ship's interests ashore in Aberdeen, Scotland, as a ship broker and manager, ship owner, part owner, and managing owner of deep water vessels; five years and a half in ship broking. I don't do anything else in Vancouver but keep in touch with shipping interests; all the shipping interests in Vancouver. I followed Mr. Barnaby's services as detailed by him this morning and afternoon on the witness stand very closely; was in the courtroom all the time. Taking my own experience in Vancouver for the past six years that I have been connected with many shipping interests and difficulties and one thing and another, assisting counsel and knowing all the shipping people, I think I can honestly say that I do not know of any ship broker in Vancouver who could have performed the services that Mr. Barnaby has stated on the witness stand he performed for the defendant or understand all the technical parts of shipping which Mr. Barnaby seems to have gone through in this complicated case. I heard his testimony. In my opinion, taking into consideration everything that Mr. Barnaby testified to, the reasonable value of the services as he stated he rendered to the French Corporation, would be 1000 pounds. 1000 pounds sterling, English money, I think is a very legitimate figure.

Cross Examination by Mr. Kiefer.

I did not make any deduction. If the traveling expenses and telegraphic and natural incidental expenses had

already been paid: I think the services outside of these expenses were worth a 1000 pounds.

GORDON STEWART CURRIE, a witness sworn on behalf of plaintiff, testified as follows upon

Direct Examination by Mr. Gorham.

My full name is Gordon Stewart Currie; am a steamship agent and broker; reside in Seattle; conduct my business on the Grand Trunk Dock, Seattle; have followed that business since 1888; in London from 1888 until 1900; from 1888 to 1892 I was with Charles Johnson & Company, ship brokers, steamship agents, not ship owners, brokers and chartering agents, principally in the West Indies; from 1892 to 1895 was with H. Clarkson, London, steamship agents, brokers, insurance brokers, and chartering agents. In Charles Johnson's there were only four of us, but in H. Clarkson's office there were between 45 and 50 at the time I was there. I was boy in Charles Johnson's office, practically learned the grounding of the business there. In H. Clarkson's I was chartering clerk in the English department. From 1895 until 1898 I was with John Callender, ship brokers, as chartering clerk; then I was sent out to New York by the Federal Steam Navigation Company of London, to manage their New York office; they were ship owners, owning ten or twelve ships, sailing out of London to Australia and the Cape, and to New Zealand, and out of New York to the Cape, Australia and New Zealand. I was their New York manager from January, 1900, until July, 1907; after that I came out to Seattle with Hind, Rolph & Company, the same firm mentioned on the witness stand here. That is, it is the Seattle firm I was with, the firm you refer to is the San Francisco one, but the same people. I was employed by them as bookkeeper and chartering clerk. They are considered one of the finest houses on the Coast. Since 1910 I did business on my own account as steamship agent and broker, insurance broker. If a vessel comes this way and the owners send that vessel to a particular ship broker or ship agent, you may call it, and if the vessel is only chartered, that is coming here with a charter, it will be the agent's duty to look after the general working of that ship while in port. For instance if she is free of charter,

as regards the custom house, he will enter her in the custom house and in the consulate's office, and generally give the master the benefit of his experience in the port he is retained in, help him in all matters, clear her outward bound; that is the ordinary duty of the ship's agent. I heard Mr. Barnaby's testimony this morning and afternoon in this case, detailing the services that he rendered this French Corporation, *Societe Nouvelle d'Armement*; I would not call that services in the ordinary line of ship's agent.

"Q. What in your opinion would be the reasonable value of the services detailed by Mr. Barnaby to the French Societe.

MR. KIEFER: I object to that. He has not shown himself qualified to answer that question. He has not shown that he was engaged in or had any knowledge of similar cases.

THE COURT: Overruled.

MR. KIEFER: Exception.

THE COURT: Allowed.

A. On the evidence I have heard Mr. Barnaby give, I would say between six and seven thousand dollars."

Cross Examination by Mr. Kiefer.

I have prepared a similar case in New York, where I was loading a ship on the wharf for Sydney, Australia, a general cargo. She had hard case oil in her; I had the sanction of the Board of Marine Underwriters to load about 500 tons of flour in her, and the captain agreed to take it, and when the cargo came alongside he absolutely refused to do so, claiming that the fumes from the case oil might penetrate into the flour, although I had taken all precautions the underwriters had told me to take in the way of building a bulkhead and having the decks caulked. He refused to take it and on the instructions of my London principals I libeled the ship.

Redirect Examination by Mr. Gorham.

I have heard of the house of Went & Company of London. Witness shown bill for statement of fees of Went & Company rendered the defendant for his services in the

collision case of the Raithwaite for 400 pounds, occupying a period of about four months.

“THE COURT: They were ship’s agents?”

MR. GORHAM: They were ship agents in regard to the Notre Dame d’Arvor, and of the Societe, in England; and rendered this service during a period of about four months on this collision, that I referred to, that took place in the English Channel.

MR. KIEFER: Object to it on the ground that it is irrelevant and immaterial.

THE COURT: Its materiality does not seem apparent.

MR. KIEFER: There is no proof that that amount has ever been paid.

THE COURT: The objection will be overruled. But it is rather far-fetched.

Q. I will show you the bill, Mr. Currie, beginning on the second page, reading, “Our fee.” Just see what the fee was charged for. I want to compare the value of services in England with the value of similar services here.

(Witness examines document.)

Q. State what is the relative value of like services in England and in British Columbia and in Seattle—for services of this character.

MR. KIEFER: I object to that as irrelevant and immaterial.

THE COURT: Objection overruled.

MR. KIEFER: Exception.

THE COURT: Allowed.

Q. Would they be higher or lower or practically the same?

A. Much higher. I should say in the ratio of two and a half to one.

Q. Much higher where?

A. Higher here.

Q. Than in England?

A. Than in England.

Q. So that for a service of similar character there would be charged much more than four hundred pounds. In the bill shown you, there is mention made of a recovery of eight thousand pounds for damage to the d’Arvor.

A. In England?

Q. In England. If that damage had been recovered for in the courts of this country on the basis of the same repairs required to be made in this case the recovery would be much larger than eight thousand pounds, wouldn't it?

A. Yes.

Q. It wouldn't be the same proportion, as you stated, with regard to services?

A. No, I don't know that it would, because labor does not carry so high as services carry.

Q. It would be two to one?

A. No.

Q. Close to it?

A. No, you can build a ship in England today for about one-half of what you can build here in the United States.

Q. I say the costs in England would be about one to two?

A. Yes.

Document referred to admitted in evidence and marked plaintiff's exhibit "21."

(Witness excused.)

J. R. BARNABY, recalled in his own behalf, testified on

Direct Examination by Mr. Gorham:

Shown bill, plaintiff's exhibit 21, and says I received this from the owners of the Societe, and that is the amount they paid their brokers in London on the collision.

MR. KIEFER: Object to that as irrelevant.

THE COURT: Overruled.

MR. KIEFER: Exception.

THE COURT: Allowed.

THE WITNESS: Went & Company were ship's agents in that case.

GEORGE F. THORNDYKE, a witness sworn on behalf of plaintiff, testified on

Direct Examination by Mr. Gorham:

My full name is George F. Thorndyke; reside in Seattle; am steamship and sailing vessel agent and broker; have been since 1901; handled sailing vessels and steamers operating from Pacific Coast to Atlantic Coast and on

the Pacific Coast; up to January, 1915, for others; since that time on my own account. I was with Globe Navigation Company only, since 1901, but prior to that I went into the employ of Dodwell & Company for three years as agent in Seattle and Alaska. I mean local managing agent for Seattle and Alaska. I have heard Mr. Barnaby's testimony here this morning and afternoon. I am familiar with the services of ship's agent of the character that he has detailed; have had experience with ship litigation. Upon being interrogated as to the reasonable value of plaintiff's services the witness was cross examined by Mr. Kiefer. I have prepared a case myself similar to the one described by Mr. Barnaby, not exactly like it; have prepared for trial probably five or six, maybe eight or ten cases, one of them particularly involving a very large amount.

Counsel for defendant objected to the question. Overruled. Thereupon the witness was asked this question by plaintiff's counsel:

"State what in your opinion is the reasonable value of the services rendered the French Societe, the defendant corporation as detailed by Mr. Barnaby," and answered the same, "I think fully as much as he has claimed herein, and anywhere between \$5,000.00 or \$6,000.00 is a fair compensation."

(Whereupon the plaintiff rested.)

"MR. KIEFER: I won't take up any time with any opening statement. If the court please, it is agreed between counsel that a certification of the record in the Superior Court is waived, and I will offer in evidence the complaint, the answer, the reply, the findings of fact and conclusions of law, and the judgment entered by the Superior Court of King County, this district, in cause No. 104,397, in which the same party is plaintiff as is here plaintiff and the same defendant is defendant.

MR. GORHAM: I understood you were to offer a copy of the file.

MR. KIEFER: I offer this copy.

MR. GORHAM: These are not the complete files, the papers you are offering. Jurisdiction was acquired by writ of garnishment.

MR. KIEFER: I agree to put that in. It is admitted that this case was begun by a writ of garnishment summoning Balfour, Guthrie & Company as garnishee, and the defendant appeared therein. There was a stipulation for the release of all funds in excess of one thousand dollars—all funds in the hands of the garnishee in excess of one thousand dollars.

MR. GORHAM: He did not appear until after the writ was issued. Is that correct?

MR. KIEFER: That is correct.

MR. GORHAM: I think we better have the garnishment papers; because it was by garnishment that the jurisdiction was obtained. If you will supply them afterwards, I am satisfied—consider that they will be supplied.

MR. KIEFER: Yes.

THE COURT: With that understanding they will be admitted.

MR. GORHAM: And the stipulation.

MR. KIEFER: Yes.

THE COURT: Within what time?

MR. KIEFER: I think if in time for the appeal will be sufficient. The writ of garnishment was served upon Balfour, Guthrie & Company. The defendant appeared and stipulated for the release of all funds in the hands of the garnishee in excess of one thousand dollars. I think that obviates the necessity of putting in those parts. However, if you find you want the copies, I will have copies made and have them put in.

Documents admitted in evidence and marked defendant's Exhib. "A."

In connection with the records just offered, it is admitted that the judgment was paid and fully satisfied, and that it is between the same parties as the parties in this case.

JAMES WARD, a witness sworn on behalf of defendant, testified as follows upon

Direct Examination by Mr. Kiefer:

My full name is James Ward; live in Tacoma; my occupation has been ship agent and ship broker; I am engaged in that at present; have been engaged in that in Tacoma for 26 years, and prior to that about as many

more mostly in England; have had experience in preparing marine cases in litigation; have prepared quite a number. The experience I have had in the getting up of evidence, assembling it, arranging it for trial in cases of marine litigation, which matters have been mostly personal, that is, I have been engaged in cases; have been a vessel owner; never followed the sea; my connection with shipping has been as a manager or investor. I heard as much of the testimony of Mr. Barnaby today as I could, being rather weak in hearing, of course I missed part of it. I followed the most of his testimony. The witness over the objection of Mr. Gorham for plaintiff, testified that, outside of all actual expenses in the way of telegrams, cables, traveling expenses, hotel expenses and all that sort of thing, in his opinion \$500.00 or \$600.00 would be reasonable for the services of Mr. Barnaby.

CHARLES JOLIVET, a witness sworn on behalf of the defendant, testified as follows on

Direct Examination by Mr. Kiefer:

I was a master mariner; followed the sea about 11 or 12 years, but since that time I have been engaged in ship brokerage and agency services, for ten or eleven years, here on Puget Sound and in San Francisco; I am familiar with the preparation of cases for trial involving shipping matters; have heard the testimony of Mr. Barnaby here today; and thereupon the witness was asked this question:

"Q. What in your judgment, Captain, is the reasonable value of Mr. Barnaby's services?"

MR. GORHAM: We desire to ask the Captain a question or two before he answers that.

THE COURT: Very well.

Cross Examination.

By MR. GORHAM:

Q. You are the agent for the defendant corporation, in this suit at bar?

A. Yes.

Q. How long have you acted as such agent?

A. Three years.

Q. You are their resident agent at Seattle, in full charge of their business here?

A. Yes.

Q. Employ counsel to defend this suit?

A. Yes.

Redirect Examination.

By MR. KIEFER:

Q. What in your judgment is the reasonable value of Mr. Barnaby's services as detailed by him on the stand?

A. Well, I think five hundred dollars is well paid.

(No Cross Examination)

Counsel for defendant thereupon rested, with the understanding that the amendment of the complaint in the case at bar to read "ship's agent" should not alter the force and effect of the judgment of the Superior Court as a bar, if it be otherwise a bar, that the term "ship's broker" should be considered by the court to mean the same as ship's agent. Counsel for plaintiff stated that this was the correct understanding.

The plaintiff was recalled by defendant for further question, and upon examination by Mr. Kiefer, testified:

That he was an agent for the defendant here in Seattle continuously up to about the time this difficulty arose early in 1912, to about April, 1912.

THE COURT: From what time?

A. 1907.

Rebuttal.

J. R. BARNABY, recalled as a witness on his own behalf testified as follows, on

Direct Examination by Mr. Gorham:

I was the plaintiff in question in No. 104,397, in the Superior Court, State of Washington, between myself and the Societe, and recovered a \$1,000.00 judgment in that case. Witness shown paper marked for identification plaintiff's exhibit 22, and asked what it is, says: that is my account for average agency against the average interests chargeable to Parrott & Company, San Francisco. The bill says "Societe Nouvelle d'Armement, Dr., to J. R. Barnaby." That is right. This is a true copy of the bill as rendered to the defendant in my letter of March

31, 1913, plaintiff's exhibit 20, referred to in the first paragraph of that letter. "I also enclose my account for services rendered to you in general average agency, \$1,000.00."

THE COURT: What exhibit is that?

MR. GORHAM: This is No. 22, if Your Honor please.

THE COURT: But the letter refers to two.

MR. GORHAM: Exhibit No. 20 refers to two bills. It refers to "account for services rendered to you general average agency, \$1,000.00," and "also enclosed my statement to you," etc., etc. There were two statements in that letter. A copy of the statement for \$10,000.00 is attached to the letter and a part of the exhibit. Plaintiff's No. 22 for identification is a copy of the other bill referred to in that letter.

Q. I will ask you if this bill was the basis of your complaint and recovery in the suit in the Superior Court?

MR. KIEFER: I object to that. That is incompetent. They sued for brokers' services, and they are bound by it, for a period embracing the period sued for in this case.

THE COURT: I will hear you on final argument on that. The objection will be overruled.

MR. KIEFER: Exception.

(Last Question Read)

A. Yes, it was.

Q. Was a copy of this bill submitted in the Superior Court suit?

A. Yes.

MR. KIEFER: Same objection.

THE COURT: Overruled.

MR. KIEFER: Let it be understood that all this examination goes in over my objection.

MR. GORHAM: Won't you admit it as a fact that our recovery of a thousand dollars was on this General Average bill?

MR. KIEFER: Yes, without admitting the materiality or competency of it, I will admit that that is the bill you offered evidence to support.

MR. GORHAM: Won't you admit that we offered no evidence touching any other service, in that suit?

MR. KIEFER: No, I won't admit that, because Mr.

Barnaby testified in extenso how much he went into it with those British Columbia lawyers."

THE WITNESS: I was present at the trial and was the main witness for the plaintiff in that trial. I alone had knowledge of the particulars of the facts upon which recovery could be had.

"Q. I will ask you if at that trial you testified in support of compensation for any services other than that involved in the General Agency?

MR. KIEFER: I object to that as incompetent, irrelevant and immaterial.

THE COURT: Same ruling.

MR. KIEFER: Exception.

THE COURT: Allowed.

A. Most certainly not.

Q. Your whole claim in that case.

THE COURT: That is rather leading.

Q. Did you or did you not testify in that case relative to receiving or not receiving instructions to render General Average Agency service?

A. I would like to have that question again.

(Question Read)

MR. KIEFER: I object to that on the same grounds.

THE COURT: Overruled.

MR. KIEFER: Exception.

THE COURT: Allowed.

A. I received instructions.

Q. I am asking you if you testified?

A. I testified.

Q. Did you testify as to receiving instructions or as to not receiving instructions?

A. I testified as to receiving instructions.

Q. Were those instructions in writing or oral?

A. They were in writing.

Q. Have you a copy of that writing?

A. Yes.

Q. Now?

A. Yes.

Q. Did you produce a copy at that trial?

A. I did.

Q. Will you produce that copy here now, if you have it?

A. Yes.

Q. I show you letter dated 9th of September, 1910, from the defendant corporation to yourself addressed to Seattle. I guess you can pick out the part that refers to general average there, quicker than I can—if you will read the paragraph.

A. This letter, Your Honor, gives an outline of the general average necessity to be looked after, contains an implied if not—

Q. Just state what it contains?

A. A direct instruction to take charge of the general average matters and to do everything usual and necessary. It is the usual course which they follow and they say here "Of course it is a complicated affair, and it will be necessary to put this in the hands of capable adjusters, in order to have an equitable statement drawn up." That was my instructions.

Q. That was referring to the casualties in the English Channel.

A. That was referring to the average, the second average. And they said, "We rely upon your personal and best attention." That was solely in regard to the average.

Q. That was dated when?

A. That letter was dated the 9th of September, 1910.

Q. Before the vessel arrived here?

A. Just about the time the vessel arrived.

Q. Before she got into complications here?

A. Before she got into complications here, yes.

Q. I will ask you whether on the strength of that letter you rendered the General Average Agency services?

MR. KIEFER: We object to that as incompetent. You cannot contradict the record in the other case.

THE COURT: That is one of the questions I will hear you on finally. Objection overruled.

MR. KIEFER: Exception.

MR. GORHAM: We offer that in evidence. And the bill is offered.

Documents referred to admitted in evidence and marked Plaintiff's Exhibits "22" and "23."

(Last Question Read)

A. I did, and it is detailed in that bill for General Average Agency service, and that alone.

I first forwarded that bill for General Average Agency, a copy of which is here introduced as plaintiff's Exhibit 22, to the Average Adjuster in San Francisco, because it was a disbursement on the general average account to be included in the general average statement, to be collected from the ship, freight and cargo interests.

Q. From whom had you expected to receive a check in payment of the bill.

MR. KIEFER: Same objection (as immaterial).

THE COURT: Overruled.

MR. KIEFER: Exception.

A. From the insurance underwriters in San Francisco, through the Average Adjusters in the usual way.

THE COURT: Your position was that it was a lien on the same fund?

A. Yes, I sent it to them March 12, 1912, one year prior to writing this letter, one year prior to signing Exhibit 20, the letter of March 31, 1913. I waited a year for the payment of my general average agency bill by the underwriters, which should come from San Francisco. I was not paid by them and so testified in the former suit. After the expiration of that year I then forwarded a copy of that bill or of that account to the defendant in the action at bar on March 31, 1913, because it was probable that the Societe had collected my One Thousand Dollars, and at the time of so sending the bill to the Societe I sent them an account for services rendered in the libel case; separate and independent statement of account; I kept the accounts at all times absolutely separate; it was necessary to do so. The witness was then asked this question.

“Q. Were the acts whereby you discharged your function as General Average Agent the same acts whereby you discharged your function as ship's agent in the matters you testified to this morning?

MR. KIEFER: Objected to as incompetent and immaterial.

THE COURT: Overruled.

MR. KIEFER: Exception.

THE COURT: Allowed.

A. The acts were entirely different."

The general average agency services referred to are facts occurring prior to the arrival of the ship in Seattle, and the matters I testified to this morning and afternoon, for which I am now claiming compensation are for services rendered subsequent to the arrival of the vessel at Seattle, and concern matters occurring after the arrival of the vessel, that is the line of demarcation. When I brought the first suit I did not know that the defendant corporation had an agent upon whom service of process could be had in the State of Washington. I filed a complaint against the Societe as a foreign corporation. A writ of garnishment was issued against Balfour, Guthrie & Company and served upon them. It was admitted that a complaint was filed and such a writ of garnishment issued and served.

Cross Examination by Mr. Kiefer:

The bill of my expenses was rendered in regard to the libel suit which is now pending. I did separate my expenses in my bills, I think in the testimony on that previous trial, I said I was not asking for any expenses upon the general average account; my expenses applied to the litigation in British Columbia only. My bills were kept entirely separate; they were separate accounts entirely.

THE COURT: That is separate not only for services but expenses?

A. Yes, Your Honor.

MR. KIEFER: Have you got any bills showing any such separation of expenses?

A. Why the bill for itself speaks to that, that was what you would pay into court on the previous case; that was perfectly clear.

Q. When you rendered your bill for extensions of protest, what were they for? What were extensions of protest used for, in general average or in litigation in British Columbia?

A. Well, the extensions of protest were used principally in the litigation in British Columbia. They were not used for the general average purposes. There might have been a slight correlation that is all. I was in Vancouver

and Victoria a little while on the general average matter, a few days and spent some money there. Witness shown bill rendered under date of July 26, 1911, and says that is for expense account only; there is no segregation of the bill, because it applies to this litigation. I did not say that the protest was used for the general average it had to do with the litigation there on the unseaworthiness of the ship; that question did not arise in general average. I testified in the other cause that I was in Vancouver and Victoria a few days; there was no traveling expenses for it in the average account; my traveling expenses and general expenses were included in the fee.

The defendant offers in evidence document referred to by witness, admitted and marked defendant's Exhibit "B."

Redirect Examination by Mr. Gorham:

I consulted counsel before I brought the first suit; the general average agency suit. You were my counsel. I directed and instructed my counsel to bring that suit.

"Q. Do you remember your counsel advising you as to the matter or the necessity of the court acquiring jurisdiction by service upon defendant.

MR. KIEFER: Objected to.

THE COURT: Overruled.

MR. KIEFER: Exception.

A. I was guided entirely by my counsel, I followed his advice implicitly.

Q. Did you state to your counsel at that time that this corporation had an agent upon whom service of process could be made?

MR. KIEFER: Same objection to that. That clearly is improper.

THE COURT: Overruled.

MR. KIEFER: Exception.

THE COURT: Allowed.

A. Well, I might have done so. But I don't understand the legal technicalities of these matters.

Q. You as a matter of fact, your counsel and you, signed an affidavit for the issuance of a writ of garnishment?

A. Why, yes. I haven't sufficient knowledge along

those lines to do anything else. I am not a lawyer.

(Witness excused)."

"WILLIAM H. GORHAM, sworn as a witness on behalf of plaintiff testified as follows:

Direct Examination.

THE WITNESS: My name is William H. Gorham. I am an attorney at law, practicing at this bar for the last twenty-five or thirty years; that I was attorney for the plaintiff in the action at bar, in the action in the Superior Court, No. 104,397, and as such had sole charge of that litigation. Prior to the commencement of the suit the plaintiff visited my office and consulted with me with reference to bringing the suit, advising me at that time of two causes of action, one for a general average agency fee.

MR. KIEFFER: I want to object to all that, if the court please, as irrelevant and immaterial, and as incompetent to contradict this record.

THE COURT: Overruled. Exception. Allowed.

THE WITNESS: A general average agency fee of a thousand dollars; the other a fee for ship's agency in the sum of ten thousand dollars, as shown by these exhibits respectively; and that at that time I inquired of him whether or not the defendant had an agent upon whom service of process could be had. And I was advised by Mr. Barnaby. After closely questioning him, that he did not know whether the person who was acting, or had been acting as agent for the vessel, was in fact authorized to act as such, and was an agent having the management of the defendant's business, sufficient management to warrant service of process upon it. And then I stated to plaintiff that if he brought an action against the company embracing both causes of action, upon both statements, the one thousand dollar statement and the ten thousand dollar statement, and served process upon Captain Jolivet, it might appear subsequently by Captain Jolivet's affidavit that he was not such an agent, or not the agent of a foreign corporation upon whom process could be had. And I advised him to bring the action upon his smaller claim and to garnishee Bal-

four, Guthrie & Company, if he was satisfied that any money in their hands belonged to the defendant company. And I was so instructed and brought the suit for the reason that after examination and interrogating my client I was not satisfied that we could take a chance in regard to bringing the suit upon both claims; that is, take a chance of acquiring jurisdiction by service of process upon Captain Jolivet. And, after the issuance of the writ of garnishment, and the service of that writ upon Balfour, Guthrie & Company, the defendant desiring to draw down whatever balance they might have in the hands of Balfour, Guthrie & Company, came to me and requested me to permit them to draw it down; and I then prepared a stipulation which set forth the fact that Captain Jolivet was the agent of this foreign corporation, and that the foreign corporation was doing business in the State of Washington. And the present counsel for the defendant, then counsel for the defendant, said to me that he had submitted that stipulation to Captain Jolivet and that Captain Jolivet had told him that it was correct. And, without stating to counsel for defendant the purpose of my including that paragraph of the stipulation in the stipulation, it was for the purpose of securing a statement upon the part of the defendant that it was doing business in this state, and that Captain Jolivet was its agent, or that it had an agent here, for the purpose of acquiring jurisdiction in a subsequent suit for the larger claim.

MR. GORHAM: We offer the stipulation in evidence. Here is a copy signed by both parties. It is not the one filed in court. It may be admitted?

MR. KIEFER: Sure.

THE COURT: It may be admitted.

Document referred to admitted in evidence and marked Plaintiff's Exhibit "24."

(Witness excused).

THE COURT: Anything further?

MR. GORHAM: That is all I believe, Your Honor.

MR. KIEFER: Nothing further on the part of the defense.

THE COURT: That is all of your evidence?

MR. GORHAM: We rest, if the court please.
Testimony closed."

And thereupon upon oral argument Mr. Gorham, attorney for plaintiff, contended that under all the evidence in the case plaintiff was entitled to judgment, and Mr. Kiefer on behalf of defendant contended that his objection to the admission of any evidence in support of the complaint must be sustained, and the evidence stricken, and further that in any event under all the evidence in the case the defendant was entitled to judgment. The cause was taken under advisement by the court; briefs to be furnished by respective counsel and such briefs were thereafter furnished, in which briefs counsel maintained their aforesaid respective contentions.

ORDER SETTLING BILL OF EXCEPTIONS.

The foregoing entitled cause coming on regularly for hearing before the Court on this 8th day of December, 1916, the time duly designated by the Court for settling and certifying bill of exceptions therein, the plaintiff and defendant now appearing by their respective attorneys of record herein, and the said defendant having within the time extended by stipulations and orders of the court herein for that purpose, this cause having been by the Court continued for the purpose of proposing and settling bill of exceptions from the May, 1916, term at which it was tried, into the November, 1916, term, duly proposed the foregoing as a bill of exceptions in said action, and no amendments thereto having been proposed by the plaintiff, and the parties now agreeing to the settlement of the foregoing as the bill of exceptions in this action.

Now, it is by the Court and the Judge of said Court, presiding at the trial of said cause **ORDERED** and **CERTIFIED** that the foregoing be and the same hereby is settled as the true bill of exceptions in said cause, and that said bill of exceptions, together with the exhibits of the plaintiff therein referred to, to-wit, plaintiff's exhibits 1 to 24 inclusive, and defendant's exhibits "A" and "B", includes all the material facts and evidence herein, and is correct in all respects, and is hereby ap-

proved, allowed and settled and made a part of the records herein, and the same being so settled and certified, it is hereby ordered to be filed herein by the clerk.

EDWARD E. CUSHMAN,

O. K., WILLIAM H. GORHAM,

Judge.

Attorney for Plaintiff.

Indorsed: Bill of Exceptions. Filed in the U. S. District Court, Western District of Washington, Northern Division, Dec. 8, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,

vs.

SOCIETE NOUVELLE D'ARMEMENT, Defendant.

}
} No. 3241

Assignment of Errors.

Now on this 7th day of December, 1916, comes the defendant by its attorney James Kiefer, and says: That the judgment entered in the above cause on the 2nd day of October, 1916, is erroneous and unjust.

First. Because it adjudges that the said plaintiff shall recover the sum of five thousand thirty-three dollars and thirty-three cents (\$5,033.33) against the said defendant.

Second. Because it adjudges that the said plaintiff shall recover of and from the defendant any sum.

Third. Because the evidence was insufficient to support or justify the finding and judgment rendered in said cause on the 2nd day of October, 1916.

Fourth. Because the court erred in overruling the objection of the defendant to the reception or introduction of any evidence to support the plaintiff's complaint.

Fifth. Because the evidence upon the trial of said cause shows that the plaintiff's cause of action was barred

at the time of the commencement of this action by the statute of limitations of the State of Washington.

Sixth. Because the undisputed evidence in the case shows that the cause of action set up in plaintiff's complaint herein was merged in and barred by the judgment entered in the Superior Court of King County, Washington, in cause No. 104,397, of the files of said Court as shown by defendant's exhibit "A" introduced herein.

Seventh. Because the undisputed evidence in the case shows that the plaintiff recovered, or ought to, or should have recovered, and would in law recover all of his claims and demands against this defendant for which he has herein sued, in that certain action in the Superior Court of King County, Washington, wherein the plaintiff herein is plaintiff and the defendant herein is defendant, being No. 104,397 of the files of said Superior Court, as shown by Defendant's exhibit "A" introduced in evidence herein on the trial.

Eighth. That the court erred in overruling the objection of the defendant to the following question propounded to the witness: GORDON STEWART CURRIE. Q. What in your opinion would be the reasonable value of the services detailed by Mr. Barnaby to the French Societe? MR. KIEFER. I object to that. He has not shown himself qualified to answer that question. He has not shown that he was engaged in or had any knowledge of similar cases. THE COURT. Overruled. MR KIEFER. Exception. THE COURT. Allowed. A. On the evidence I have heard Mr. Barnaby give, I would say between six and seven thousand dollars.

Ninth. That the court erred in overruling the objection of the defendant to the following question propounded to the witness: Q. State what is the relative value of like services in England and in British Columbia and in Seattle—for services of this character. MR. KIEFER. I object to that as irrelevant and immaterial. THE COURT. Objection overruled. MR. KIEFER. Exception. THE COURT. Allowed. Q. Would they be higher or lower or practically the same? A. Much higher. I should say in the ratio of two and a half to one.

Tenth. That the court erred in overruling the objection of the defendant to the following question propounded to the witness: J. R. BARNABY. Shown bill, Plaintiff's Exhibit "21," and says I received this from the owners of the Societe, and that is the amount they paid their brokers in London on the collision. MR. KIEFER. Object to that as irrelevant. THE COURT. Overruled. MR. KIEFER. Exception. THE COURT. Allowed.

Eleventh. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. I will ask you if at that trial you testified in support of compensation for any services other than that involved in the General Agency? MR. KIEFER. I object to that as incompetent, irrelevant and immaterial. THE COURT. Same ruling. MR. KIEFER. Exception. THE COURT. Allowed. A. Most certainly not.

Twelfth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. Did you or did you not testify in that case relative to receiving or not receiving instructions to render General Average Agency service? A. I would like to have that question again. (Question read). MR. KIEFER. I object to that on the same grounds. THE COURT. Overruled. MR. KIEFER. Exception. THE COURT. Allowed. A. I received instructions. Q. I am asking you if you testified? A. I testified.

Thirteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. I will ask you whether on the strength of that letter you rendered the General Average Agency services? MR. KIEFER. We object to that as incompetent. You cannot contradict the record in the other case. THE COURT. That is one of the questions I will hear you on finally. Objection overruled. MR. KIEFER. Exception. MR. GORHAM. We offer that in evidence. And the bill is offered, and admitted as plaintiff's exhibits "22" and "23." (Last question read). A. I did, and it is detailed in that bill for General Average Agency service, and that alone. I first forwarded the bill

for General Average Agency, a copy of which is here introduced as plaintiff's exhibit "22," to the Average Adjuster in San Francisco, because it was a disbursement on the general average account to be included in the general average statement, to be collected from the ship, freight and cargo interests.

Fourteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. From whom had you expected to receive a check in payment of the bill? MR. KIEFER. Same objection. (As immaterial). THE COURT. Overruled. MR. KIEFER. Exception. A. From the insurance underwriters in San Francisco, through the average adjusters in the usual way.

Fifteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. Were the acts whereby you discharged your function as General Average Agent the same acts whereby you discharged your function as ship's agent in the matters you testified to this morning? MR. KIEFER. Objected to as incompetent and immaterial. THE COURT. Overruled. MR. KIEFER. Exception. THE COURT. Allowed. A. The acts were entirely different. The general average agency services referred to facts occurring prior to the arrival of the ship in Seattle, and the matters I testified to this morning and afternoon, for which I am now claiming compensation are for services rendered subsequent to the arrival of the vessel at Seattle, and concern matters occurring after the arrival of the vessel, that is the line of demarcation. When I brought the first suit I did not know that the defendant corporation had an agent upon whom service of process could be had in the State of Washington. I filed a complaint against the Societe as a foreign corporation. A writ of garnishment was issued against Balfour, Guthrie & Company and served upon them. It was admitted that a complaint was filed and such a writ of garnishment issued and served.

Sixteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. Do you remember your

counsel advising you as to the matter of the necessity of the court acquiring jurisdiction by service upon defendant? MR. KIEFER. Objected to. THE COURT. Overruled. MR. KIEFER. Exception. A. I was guided entirely by my counsel, I followed his advice implicitly.

Seventeenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. Did you state to your counsel at that time that this corporation had an agent upon whom service of process could be made? MR. KIEFER. Same objection to that. That clearly is improper. THE COURT. Overruled. MR KIEFER. Exception. THE COURT. Allowed. A. Well, I might have done so. But I don't understand the legal technicalities of these matters.

Eighteenth. That the court erred in overruling the objection of the defendant to the testimony given by the witness Gorham on behalf of the plaintiff. MR. KIEFER. I want to object to all that, if the court please, as irrelevant and immaterial, and as incompetent to contradict this record. THE COURT. Overruled. Exception. Allowed. THE WITNESS. A general average agency fee of a thousand dollars; the other a fee for ship's agency in the sum of ten thousand dollars, as shown by these exhibits respectively; and that at that time I inquired of him whether or not the defendant had an agent upon whom service of process could be had. And I was advised by Mr. Barnaby after closely questioning him, that he did not know whether the person who was acting, or had been acting as agent for the vessel, was in fact authorized to act as such, and was an agent having the management of the defendant's business, sufficient management to warrant service of process upon it. And then I stated to plaintiff that if he brought an action against the company embracing both causes of action, upon both statements, the one thousand dollar statement and the ten thousand dollar statement, and served process upon Captain Jolivet, it might appear subsequently by Captain Jolivet's affidavit that he was not such an agent, or not the agent of a foreign corporation upon whom process could be had. And I advised him to bring the action upon his smaller claim and to garnishee Balfour, Guthrie & Company, if he was

satisfied that any money in their hands belonged to the defendant company. And I was so instructed and brought the suit for the reason that after examination and interrogating my client I was not satisfied that we could take a chance in regard to bringing the suit upon both claims; that is, take a chance of acquiring jurisdiction by service of process upon Captain Jolivet. And, after the issuance of the writ of garnishment, and the service of that writ upon Balfour, Guthrie & Company, the defendant desiring to draw down whatever balance they might have in the hands of Balfour, Guthrie & Company, came to me and requested me to permit them to draw it down; and I then prepared a stipulation which set forth the fact that Captain Jolivet was the agent of this foreign corporation, and that the foreign corporation was doing business in the State of Washington. And the present counsel for the defendant, then counsel for the defendant, said to me that he had submitted that stipulation to Captain Jolivet and that Captain Jolivet had told him that it was correct. And, without stating to counsel for defendant the purpose of my including that paragraph of the stipulation in the stipulation, it was for the purpose of securing a statement upon the part of the defendant that it was doing business in this state, and that Captain Jolivet was its agent, or that it had an agent here, for the purpose of acquiring jurisdiction in a subsequent suit for the larger claim.

WHEREFORE, the defendant prays that said judgment be reversed and the District Court directed to dismiss said action as prayed in the answer herein.

JAMES KIEFER,
Attorney for Defendant.

Copy of above assignment of error received, and due service of same acknowledged this 7th day of December, A. D. 1916.

WILLIAM H. GORHAM,
Attorney for Plaintiff.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 7, 1916. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy.

In the United States District Court, for the Western
District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,

vs.

SOCIETE NOUVELLE D'ARMEMENT, Defendant.

} No. 3241

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, Societe Nouvelle d'Armement, a corporation, the above named defendant, as principal, and the United States Fidelity & Guaranty Company, a body corporate, duly incorporated under the Laws of the State of Maryland, and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto J. R. Barnaby, the above named plaintiff, in the sum of six thousand (\$6,000.00) dollars, to be paid to said plaintiff, his executors, administrators and assigns, for which payment well and truly to be made, we bind ourselves, our and each of our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 7th day of December, 1916.

The condition of the above obligation is such that whereas in the above court and cause, final judgment was rendered against the said defendant and in favor of plaintiff in the sum of five thousand thirty-three dollars and thirty-three cents (\$5,033.33) with plaintiff's costs and disbursements; and

WHEREAS, the said defendant has obtained from said court a writ of error to reverse the judgment in said action and a citation directed to the plaintiff is about to be issued citing and admonishing him to be and appear in the United States Circuit Court of Appeals, for the Ninth circuit, to be held at San Francisco, in the State of California:

NOW, THEREFORE, if the said defendant, Societe Nouvelle d'Armement, a corporation, shall prosecute the said writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its

plea good, then the above obligation to be void, otherwise to remain in full force and effect.

SOCIETE NOUVELLE D'ARMEMENT,
By JAMES KIEFER,

(SEAL)

Its Attorney.

United States Fidelity and Guaranty Co. By John C. McCollister, Attorney in Fact.

The sufficiency of the surety on the foregoing bond approved by me on this 7th day of December, 1916.

JEREMIAH NETERER,
Judge of Said Court.

Copy of within Supersedeas Bond received, and due service of same acknowledged this 7th day of December, 1916.

WILLIAM H. GORHAM,

O. K. as to amount of surety. William H. Gorham, December 7, 1916.
Attorney for Plaintiff.

Indorsed: Supersedeas Bond. Filed in the U. S. District Court, Western District of Washington, Northern Division, Dec. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,

vs.

SOCIETE NOUVELLE D'ARMEMENT, Defendant.

} No. 3241

Order Directing the Clerk to Transmit Original Exhibits.

In this cause upon stipulation of the parties, and it appearing to the court to be a proper case therefor, it is by the court ORDERED, that the clerk do transmit to the clerk of the Appellate Court the original exhibits offered and filed by the parties upon the trial of this cause.

Done in open court December 11, 1916.

JEREMIAH NETERER,
Judge.

Indorsed: Order Directing the Clerk to Transmit Original Exhibits. Filed in the U. S. District Court, Western District of Washington, Northern Division, Dec. 11, 1916, Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

UNITED STATES OF AMERICA } ss.

The President of the United States of America to the Judges of the District Court of the United States for the Western District of Washington, Northern Division,
GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, or some of you, between J. R. Barnaby, plaintiff, and Societe Nouvelle d'Armement, a corporation, defendant, a manifest error hath happened, to the great damage of the said Societe Nouvelle d'Armement, a corporation, defendant, as is said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States Circuit of Appeals for the Ninth Circuit, at the courtrooms of the said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same before the justice aforesaid, on the 6th day of January, 1917, that the record and proceedings aforesaid, being inspected, the said justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

WITNESS, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 7th day of December, in the year of our Lord one thousand

nine hundred and sixteen, and the Independence of the United States the one hundred and forty-first.

(Seal)

FRANK L. CROSBY,

Clerk of Said District Court of the United States, for the Western District of Washington.

The foregoing writ is hereby allowed.

JEREMIAH NETERER,

United States District Judge, for the Western District of Washington.

Copy of within writ of error received and due service of same acknowledged this 7th day of December, 1916.

WILLIAM H. GORHAM,

Attorney for Plaintiff.

Indorsed: No. 3241. In the United States District Court, for the Western District of Washington, Northern Division. J. R. Barnaby, Plaintiff, vs. Societe Nouvelle d'Armement, Defendant. Writ of Error. Filed in the U. S. District Court, Western District of Washington, Northern Division, Dec. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,

vs.

SOCIETE NOUVELLE D'ARMEMENT, Defendant.

} No. 3241

Citation.

UNITED STATES OF AMERICA, }
To J. R. BARNABY, } ss.

GREETING:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the city of San Francisco, State of California, on the 6th day of January, 1917, pursuant to a writ of error filed in the clerk's office of the

District Court of the United States, for the Western District of Washington, Northern Division, wherein Societe Nouvelle d'Armement, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated the 7th day of December, 1916.

(Seal) JEREMIAH NETERER,
United States District Judge for the Western District of Washington.

Attest: FRANK L. CROSBY,
Clerk of Said United States District Court for the Western District of Washington.

By.....
Deputy.

We hereby, this 7th day of December, 1916, acknowledge service of the foregoing Citation at the City of Seattle, Washington.

WILLIAM H. GORHAM,
Attorney for said J. R. Barnaby.

Received copy of the foregoing Citation lodged with me for defendant in error this 7th day of December, 1916.

FRANK L. CROSBY,
Clerk of Said United States District Court.

Indorsed: No. 3241. In the United States District Court, for the Western District of Washington, Northern Division, J. R. Barnaby, Plaintiff, vs. Societe Nouvelle d'Armement, Defendant. Citation. Filed in the U. S. District Court, Western District of Washington, Northern Division, Dec. 7, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. James Kiefer for Defendant. Suite 327 Colman Bldg., Seattle.

In the United States District Court, for the Western
District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,

vs.

SOCIETE NOUVELLE D'ARMEMENT, Defendant.

No. 3241

Praeceptum for Printing.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please have printed under the statute, and when printed certify as the record of this cause, the following papers: Complaint, summons and return, answer, reply, stipulation waiving jury trial, opinion of the trial court, finding, judgment, petition for new trial, order denying petition for new trial, petition for writ of error, order granting writ of error, writ of error "original only," assignments of error, citation "original only," bill of exceptions, and supersedeas bond, this praecipe.

JAMES KIEFER,

Attorney for Defendant, and Plaintiff in Error.

Copy of within Praeceptum received and service of same acknowledged this 11th day of December, 1916.

WILLIAM H. GORHAM,

Attorney for Plaintiff.

Indorsed: Praeceptum for Printing. Filed in the U. S. District Court, Western District of Washington, Northern Division, Dec. 11, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western
District of Washington, Northern Division.

J. R. BARNABY, Plaintiff,

vs.

SOCIETE NOUVELLE D'ARMEMENT, Defendant.

No. 3241

*Certificate of Clerk U. S. District Court to Transcript of
Record.*

UNITED STATES OF AMERICA,

WESTERN DISTRICT OF WASHINGTON,

ss.

I, Frank L. Crosby, Clerk of the United States District

Court, Western District of Washington, do hereby certify the foregoing 77 printed pages, numbered from 1 to 77, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above entitled cause, as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Plaintiff in Error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee (Sec. 828 R. S. U. S.), for making record, certificate or return, 305 folios at 15c.....	\$45.75
Certificate of Clerk to transcript of record, 4 folios at 15c .....	.60
Seal to said Certificate.....	.20
Certificate of Clerk to original exhibits, 3 folios at 15c .....	.45
Seal to said Certificate.....	.20
<hr/> Total	<hr/> \$47.20

I hereby certify that the above cost for preparing and certifying record amounting to \$47.20, has been paid to me by James Kiefer, Esq., attorney for Plaintiff in Error.

I further certify that I hereto attach and herewith trans-

mit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said district, this 2nd day of January, 1917.

(Seal)

FRANK L. CROSBY,
Clerk U. S. District Court.

In the United States Circuit Court of Appeals

for the Ninth Circuit

SOCIETE NOUVELLE d'ARMEMENT,
Plaintiff in Error.

vs.

J. R. BARNABY,
Defendant in Error

Upon Writ of Error to the United States District Court for the
Western District of Washington, Northern Division.

Brief of Plaintiff In Error

File

FEB 13 19

JAMES KIEFER,

F. D. Monck

Attorney for Plaintiff in Error
Suite 327 Colman Bldg.
Seattle, Wash.

**In the United States Circuit
Court of Appeals**

for the Ninth Circuit

SOCIETE NOUVELLE d'ARMEMENT,
Plaintiff in Error.

vs.

J. R. BARNABY,
Defendant in Error

Upon Writ of Error to the United States District Court for the
Western District of Washington, Northern Division.

Brief of Plaintiff In Error

In the United States Circuit Court of Appeals for the
Ninth Circuit.

SOCIETE NOUVELLE d'ARMEMENT,	}	No. 2914
Plaintiff in Error,		
vs.		
J. R. BARNABY, Defendant in Error.		

Upon Writ of Error to the United States District Court
for the Western District of Washington,
Northern Division.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This action was instituted February 9, 1916, by the defendant in error to recover for alleged services as a ship's broker, between the 29th day of October, 1910, and the 6th day of June, 1912, in the State of Washington, and in the Province of British Columbia, Canada, alleged to have been rendered to defendant at its instance and request, in writing. The reasonable value of said services is alleged to be the sum of Five Thousand (\$5000.00) Dollars.

In the second paragraph of the complaint it was alleged that the defendant was a corporation, organized and existing under the laws of the Republic of France, and for more than three years last past had maintained and was maintaining a general agent at Seattle, Washington, for the more convenient transaction of its business in said State; and had maintained and was then maintaining a line of vessels, plying with reasonable regularity in the carrying trade between the ports of the state of Washington and foreign ports, importing and exporting general cargoes. This allegation of the complaint was admitted by the answer. (Record p. 1).

The answer of the defendant, a corporation, under the laws of France, denied the allegations as to the services, except that it was admitted that the plaintiff, at the request of defendant, performed certain services in regard to ship's business at about the times mentioned in plaintiff's complaint.

For a first affirmative defense it was set up in the answer that on October 22nd, 1914, plaintiff herein began a cause in the Superior Court of King County, Washington, for the same cause of action, for the same services and upon the same contract pleaded and relied upon by the plaintiff in this cause, and covering the same transactions, and it was further alleged that defendant appeared and joined issue in the cause in the Superior Court and that judgment was entered therein in favor of the plaintiff and against defendant in the sum of \$1081.00 on May 18th, 1915, and plaintiff's costs, and that said judgment was thereafter fully paid and satisfied by the defendant. For a second affirmative defense, defendant set up the statute of limitations of the State of Washington, namely, that the action had not been begun or commenced within three years after the rendition of the services sued for. (Record p. 3 and 4.)

The plaintiff by reply denied all the affirmative allegations of the answer. (Record p. 5.)

There was a written stipulation waiving trial by jury. (Record p. 6).

Upon the calling of the case for trial, on July 14th, 1916, counsel for plaintiff moved to amend the complaint in the 4th paragraph by erasing the words "ship's broker" and inserting in lieu thereof "ship's agent." Upon objection made by counsel for defendant, it was stipulated by counsel for plaintiff, in open court, that the services sued for in the case in the Superior Court, referred to and set up in defendant's answer, were rendered as a "ship's agent," and that for the purposes of defendant's plea of former recovery, the term "ship's broker" used in the complaint in the Superior Court, and the term "ship's agent," in this cause after amendment should be held to mean the same thing and should not prejudice defendant's plea of former recovery, and that such pleading of former recovery or *res judicata* should have the same effect as though there had been no amendment, and thereupon the amendment was allowed. (Record p. 23).

Counsel for plaintiff thereupon made an opening

statement to the Court, embodying among other things, the statement that plaintiff relied upon certain letters as evidencing the contract of employment, but containing no direct promise of compensation for the services, and mentioning no sum agreed to be paid plaintiff; and that parol evidence would be offered of the reasonable value of the services alleged to have been rendered by plaintiff.

Counsel for defendant objected to the introduction of any evidence in support of the complaint, for the reason that it was apparent from the record that the action is barred by the statute of limitations of the State of Washington, and that it is apparent on the face of the complaint.

After argument the Court declined to rule, reserving the question for consideration on the final argument; and it was thereupon agreed between counsel in open court that all of plaintiff's evidence should go in, subject to this objection, and that defendant should not waive it by offering testimony in its own behalf. (Record p. 23 and 24).

Evidence was introduced by the testimony of plaintiff as to the character and extent of the alleged services; a number of written exhibits were introduced, and parol evidence was offered, both by the plaintiff's testimony and that of other witnesses of the value of the services. Defendant offered testimony of the value of the services. Counsel for plaintiff insisted upon his right to judgment under all the evidence, and counsel for defendant insisted that his objection to the admission of any evidence in support of the complaint must be sustained; and that in any event, defendant was entitled to a judgment of dismissal, under all the evidence. After argument the court took the case under advisement, written briefs to be furnished by counsel on both sides. Thereafter the Court filed a memorandum decision or opinion for the plaintiff in the sum of Four Thousand (\$4000.00) Dollars. (Record p. 7 to 14).

A general finding was made for the plaintiff, to which defendant excepted, and judgment was entered thereon. (Record p. 14, 15 and 16).

A petition for new trial was filed according to rule, and it was denied, and exception saved. (Record p. 16 to 20).

This Writ of Error was thereupon sued out.

SPECIFICATIONS OF ERROR.

First: The judgment was erroneous because it adjudges that the said plaintiff shall recover the sum of five thousand thirty-three dollars and thirty-three cents (\$5,033.33) against the said defendant.

Second. Because it adjudges that the said plaintiff shall recover of and from the defendant any sum.

Third. Because the evidence was insufficient to support or justify the finding and judgment rendered in said cause on the 2nd day of October, 1916.

Fourth. Because the court erred in overruling the objection of the defendant to the reception or introduction of any evidence to support plaintiff's complaint.

Fifth. Because the evidence upon the trial of said cause shows that the plaintiff's cause of action was barred at the time of the commencement of this action by the statute of limitations of the State of Washington..

Sixth. Because the undisputed evidence in the case shows that the cause of action set up in plaintiff's complaint herein was merged in and barred by the judgment entered in the Superior Court of King County, Washington, in cause No. 104,397, of the files of said Court as shown by defendant's exhibit "A" introduced herein.

Seventh. Because the undisputed evidence in the case shows that the plaintiff recovered, or ought to, or should have recovered, and would in law recover all of his claims and demands against this defendant for which he has herein sued, in that certain action in the Superior Court of King County, Washington, wherein the plaintiff herein is plaintiff and the defendant herein is defendant, being No. 104,397 of the files of said Superior Court, as shown by defendant's exhibit "A" introduced in evidence herein on the trial.

Eighth. That the court erred in overruling the objection of the defendant to the following question propounded to the witness: GORDON STEWART CURRIE. Q. What in your opinion would be the reasonable value of the services detailed by Mr. Barnaby to the French Societe? MR. KIEFER. I object to that. He has not shown himself qualified to answer that question. He has not shown that he was engaged in or had any knowledge of similar cases. THE COURT. Overruled. MR. KIEFER. Exception. THE COURT. Allowed. A. On the evidence I have heard Mr. Barnaby give, I would say between six and seven thousand dollars.

Ninth. That the court erred in overruling the objection of the defendant to the following question propounded to the witness: Q. State what is the relative value of like services in England and British Columbia and in Seattle—for services of this character. MR. KIEFER. I object to that as irrelevant and immaterial. THE COURT. Objection overruled. MR. KIEFER. Exception. THE COURT. Allowed. Q. Would they be higher or lower or practically the same? A. Much higher. I should say in the ratio of two and a half to one.

Tenth. That the court erred in overruling the objection of the defendant to the following question propounded to the witness: J. R. BARNABY. Shown bill, Plaintiff's Exhibit "21," and says I received this from the owners of the Societe, and that is the amount they paid their brokers in London on the collision. MR. KIEFER. Object to that as irrelevant. THE COURT. Overruled. MR. KIEFER. Exception. THE COURT. Allowed.

Eleventh. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff: Q. I will ask you if at that trial you testified in support of compensation for any services other than that involved in the General Agency. MR. KIEFER: I object to that as incompetent, irrelevant and immaterial. THE COURT: Same ruling. MR. KIEFER: Exception. THE COURT: Allowed. A. Most certainly not.

Twelfth. That the court erred in overruling the objec-

tion of the defendant to the following question propounded to the plaintiff. Q. Did you or did you not testify in that case relative to the receiving or not receiving instructions to render General Average Agency service? A. I would like to have that question again. (Question read). MR. KIEFER. I object to that on the same grounds. THE COURT. Overruled. MR. KIEFER. Exception. THE COURT. Allowed. A. I received instructions. Q. I am asking you if you testified. A. I testified.

Thirteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff: Q. I will ask you whether on the strength of that letter you rendered the General Average Agency services? MR. KIEFER. We object to that as incompetent. You cannot contradict the record in the case. THE COURT. That is one of the questions I will hear you on finally. Objection overruled. MR. KIEFER. Exception. MR. GORHAM. We offer that in evidence. And the bill is offered, and admitted as plaintiff's exhibits "22" and "23." (Last question read). A. I did, and it is detailed in that bill for General Average Agency service, and that alone. I first forwarded the bill for General Average Agency, a copy of which is here introduced as plaintiff's exhibit "22," to the Average Adjuster in San Francisco, because it was a disbursement on the general average account to be included in the general average statement, to be collected from the ship, freight and cargo interests.

Fourteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. From whom had you expected to receive a check in payment of the bill? MR. KIEFER. Same objection. (As immaterial). THE COURT. Overruled. MR. KIEFER. Exception. A. From the insurance underwriters in San Francisco, through the average adjusters in the usual way.

Fifteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. Were the acts whereby you discharged your function as General Average Agent the

same acts whereby you discharged your function as ship's agent in the matters you testified to this morning? MR. KIEFER. Objected to as incompetent and immaterial. THE COURT. Overruled. MR. KIEFER. Exception. THE COURT. Allowed. A. The acts were entirely different. The general average agency services referred to facts occurring prior to the arrival of the ship in Seattle, and the matters I testified to this morning and afternoon, for which I am now claiming compensation are for services rendered subsequent to the arrival of the vessel at Seattle, and concern matters occurring after the arrival of the vessel, that is the line of demarcation. When I brought the first suit I did not know that the defendant corporation had an agent upon whom service of process could be had in the State of Washington. I filed a complaint against the Societe as a foreign corporation. A writ of garnishment was issued against Balfour, Guthrie & Company and served upon them. It was admitted that a complaint was filed and such writ of garnishment issued and served.

Sixteenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. Do you remember your counsel advising you as to the matter of the necessity of the court acquiring jurisdiction by service upon defendant? MR. KIEFER. Objected to. THE COURT. Overruled. MR. KIEFER. Exception. A. I was guided entirely by my counsel. I followed his advice implicitly.

Seventeenth. That the court erred in overruling the objection of the defendant to the following question propounded to the plaintiff. Q. Did you state to your counsel at that time that this corporation had an agent upon whom service of process could be made? MR. KIEFER. Same objection to that. That clearly is improper. THE COURT. Overruled. MR. KIEFER. Exception. THE COURT. Allowed. A. Well, I might have done so. But I don't understand the legal technicalities of these matters.

Eighteenth. That the court erred in overruling the objection of the defendant to the testimony given by the witness Gorham on behalf of the plaintiff. MR. KIEFER. I want to object to all that, if the court please, as irrele-

vant and immaterial, and as incompetent to contradict this record. THE COURT. Overruled. Exception. Allowed. THE WITNESS. A general average agency fee of a thousand dollars; the other a fee for ship's agency in the sum of ten thousand dollars, as shown by these exhibits respectively; and that at that time I inquired of him whether or not the defendant had an agent upon whom service of process could be had. And I was advised by Mr. Barnaby after closely questioning him, that he did not know whether the person who was acting, or had been acting as agent for the vessel, was in fact authorized to act as such, and was an agent having the management of the defendant's business, sufficient management to warrant service of process upon it. And then I stated to plaintiff that if he brought an action against the company embracing both causes of action, upon both statements, the one thousand dollar statement and the ten thousand dollar statement, and served process upon Captain Jolivet, it might appear subsequently by Captain Jolivet's affidavit that he was not such an agent, or not the agent of a foreign corporation upon whom process could be had. And I advised him to bring the action upon his smaller claim and to garnishee Balfour, Guthrie & Company, if he was satisfied that any money in their hands belonged to the defendant company. And I was so instructed and brought the suit for the reason that after examination and interrogating my client I was not satisfied that we could take a chance in regard to bringing the suit upon both claims; that is, take a chance of acquiring jurisdiction by service of process upon Captain Jolivet. And, after the issuance of the writ of garnishment, and the service of that writ upon Balfour, Guthrie & Company, the defendant desiring to draw down whatever balance they might have in the hands of Balfour, Guthrie & Company, came to me and requested me to permit them to draw it down; and I then prepared a stipulation which set forth the fact that Captain Jolivet was the agent of this foreign corporation, and that the foreign corporation was doing business in the State of Washington. And the present counsel for the defendant, then counsel for the defendant, said to me that he had submitted that stipulation to Captain Jolivet and that Captain Jolivet had told him that

it was correct. And, without stating to counsel for defendant the purpose of my including that paragraph of the stipulation in the stipulation, it was for the purpose of securing a statement upon the part of the defendant that it was doing business in this State, and that Captain Jolivet was its agent, or that it had an agent here, for the purpose of acquiring jurisdiction in a subsequent suit for the larger claim.

ARGUMENT.

We will first consider our Fourth Assignment of Error, which is predicated upon the refusal of the trial court to sustain the objection of the plaintiff in error to the admission of any evidence to support the complaint.

The allegation of the complaint is that the services sued for were rendered between October 29th, 1910, and June 6th, 1912, and that they were rendered upon the request of the plaintiff in error, in writing. There is a further allegation of the reasonable value of the services. (Record p. 1.)

When the case was called for trial, counsel for defendant in error made an opening statement to the effect that the plaintiff relied upon certain letters of the defendant as evidencing the contract of employment, but containing no direct promise of compensation for the services, and mentioning no sum agreed to be paid plaintiff, and that evidence would be offered of the reasonable value of the services alleged to have been rendered by defendant in error. Thereupon counsel for plaintiff in error objected to the admission of any evidence in support of plaintiff's complaint for the reason that it appears from the record as it then stood and from the complaint itself that the action was barred by the statute of limitations of the State of Washington. The trial court after argument declined to rule upon the objection, reserving the question until the close of the case. It was thereupon agreed that all of plaintiff's evidence should be subject to this objection, and that defendant should not waive its objection by offering evidence in its own behalf. (Record, p. 23 and 24.)

The trial court never distinctly passed upon this ques-

tion, but in his memorandum of opinion (Record pp. 7 to 10) treats the objection as a demurrer to the evidence after its reception. We submit that the Court therein erred. This objection must be considered strictly in the light of the complaint and the opening statement of counsel. The statute of the State of Washington affecting this question reads as follows:

Within three years "an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."

Rem. & Bal. Code, Sec. 159.

It should be borne in mind that the last service was rendered June 6th, 1912, and the action was begun February 9th, 1916, so that clearly three years had run at the time when the action was begun.

The defendant in error is clearly bound by the allegation in his complaint that the plaintiff in error, during more than three years prior to the bringing of his action was maintaining an office and agency and had a general agency within the territorial jurisdiction of this court. This clearly appears from the case of

Northern Pacific Ry. Co. vs. Paine, 119 U. S. 561;
30 Law Ed. 513.

We submit that the statute which we have quoted above is applicable to the case at bar. It is true that the complaint alleged that the services were rendered at the written request of the plaintiff in error, but coupled therewith is the allegation of reasonable value of the services.

In the case of *Ingalls vs. Angell*, 76 Wash. 692, the Supreme Court of the State of Washington construed this statute, and as we view it settled this question. That was an action to recover for the value of nursery stock which had been delivered upon a written order mentioning no price to be paid for the trees. Oral testimony was resorted to to show their reasonable value; and the Supreme Court of the State of Washington, says:

"The written order upon which an attempt was made to state a cause of action did not contain anything as

to the price of the trees. This was an essential element of the contract. It would appear then, that one of the necessary terms not being set out in the writing, in order to establish the price, resort must be made to oral testimony. The contract would be in part oral and in part written. The rule is that a contract partly in writing and partly oral is an oral contract."

Bishop on Contracts, Sec 164.

Commissioners of Marion County vs. Shipley, 77 Ind. 553.

The State of Washington has the usual statutory provision that the period of absence of a defendant from the state should not be included in the computation of time necessary to the running of the statute. It is clear, however, that the fact is that the plaintiff in error for more than three years prior to the institution of this action, and after the accrual of the cause of action, maintained an agency within the territorial jurisdiction of this court, and had at said times an agent upon whom process could be served, the statute of limitations therefore ran in favor of the plaintiff in error during all of this time.

Southern Railway Co. vs. Mayes, 113 Fed. 84;

Crowder vs. Morphy, 61 Wash. 626;

Ilse vs. Aetna Indemnity Co., 69 Wash. 484;

Turcott vs. Yazoo, etc., Ry. Co., 40 L. R. A. 768;

U. S. Express Co. vs. Ware, 87 U. S. 543, Book 22 L. Ed. 422.

The defendant in error having alleged in his complaint the doing of business in the state, and the maintenance of an office and an agency therein for more than three years after the accrual of the cause of action, and prior to the beginning of this action, is estopped to claim that the plaintiff in error may not plead the statute.

Harrington vs. Gordon, 42 Wash. 692;

Lumley vs. Wabash Ry. Co., 71 Fed. 21.

The defendant in error at the trial made the contention that the statute applicable to this case is the six years and not the three years statute. The portion of the six years

statute of limitations of the State of Washington which must be invoked to aid the defendant in error is Sub-Division 2 of Sec. 157, Rem. & Bal. Code, and reads as follows:

2. "An action upon a contract in writing, or liability, expressed or implied, arising out of a written agreement;"

We submit that the construction of the statute by the Supreme Court of the State of Washington appearing in the case of *Ingalls vs. Angell*, *supra*, is controlling and should be followed by this Court.

In *Railway Passengers Association vs. Loomis*, 32 N. E. 424, it is held that if parol evidence is required to help out a written contract and supply missing terms, the entire contract is oral.

In the case of *Grafton vs. Cummings*, 99 U. S. 100, Book 25, L. Ed. 366, it is held that if a written contract failed to contain all the terms to make it a valid and enforceable contract, and resort be had to parol evidence to supply such lack, the entire contract is thereby made oral.

The opinion of the trial court shows that in ruling upon this question the court was influenced not by the pleadings as amplified by the opening statement of counsel for the defendant in error at the time the objection was made, but considered what he conceived to be the evidence. (Record p. 10).

The allegation of agency for more than three years being admitted in the answer, the defendant in error was absolutely bound thereby as we have shown in the cases cited.

Passing to the evidence, however, we submit that there is absolutely no evidence to sustain the view of the trial court upon this question.

When Captain Jolivet, the local agent of plaintiff in error, was on the stand as a witness for a particular and specific purpose, namely, to testify as an expert as to the value of alleged services of defendant in error, he was cross-examined by Mr. Gorham, solely with a view to show his interest in the controversy; and he then testified that

he had acted as the agent of the plaintiff in error for three years. (Record p. 55). This was not followed up to show that it was exactly three or more than three years. He was testifying in the month of July, 1916. For aught that appears he might have been the agent of the plaintiff in error for three years and ten or eleven months. It is admitted that Captain Jolivet succeeded the defendant in error. The defendant in error stated that he did nothing after April, 1912; that he was not thereafter the agent of the plaintiff in error (Record p. 56).

There was no issue upon the question of the plaintiff in error being duly represented by an agent in the City of Seattle, for a period more than sufficient to bar the cause of action of the defendant in error, if the three years statute applies. There being no issue upon this question, and the testimony having been elicited for a specific purpose, namely, to affect the credibility of the witness, Jolivet, by showing his interest, the trial court was clearly in error in disposing of our objection to the introduction of testimony in the manner in which he did. This objection should have been disposed of in the light of the record as it stood at the time the objection was made. The defendant in error having made in his complaint the allegation that he did, with regard to agency, and having served plaintiff in error through its agent, we submit that he is absolutely bound by his allegation and procedure. There is nothing in the record, therefore, to sustain the trial court's view that during a portion of the three years prior to the beginning of this action, the defendant in error was still the agent of the plaintiff in error and for that reason could not bring his action. He, himself, ceased to be agent in April, 1912 (Record p. 56). His successor was Captain Jolivet, as is admitted. He has alleged in his complaint that for more than three years prior to the beginning of this action, the plaintiff in error maintained an office and agent in Seattle.

Under the statutes of the State of Washington, mere service of the summons and complaint would not toll the running of the statute of limitations.

Sec. 167, Rem. & Bal. Code, provides:

"The limitations prescribed in this act (Chapter) shall

apply to actions . . . an action shall be deemed commenced when the complaint is filed.”

Blalock vs. Condon, 51 Wash. 604;
Service vs. McMahon, 42 Wash. 452.

But it clearly appears from the record as we have shown, that the defendant in error could at all times for more than three years prior to the commencement of this action, have obtained service upon the plaintiff in error, precisely as he has done it in this action, and therefore the objection of the plaintiff in error to the introduction of testimony to support the complaint should have been sustained.

Defendant in error made no offer or motion and took no order permitting any amendment of the pleadings. This objection of the plaintiff in error to the reception of evidence must therefore be considered upon the pleadings and upon the opening statement of counsel made to the court. The objection made by counsel for the plaintiff in error is in accordance with the practice in the courts of the State of Washington.

Belknap Glass Co vs. Kelleher et al., 72 Wash. 529;
Gladden vs. Jacobowski, 61 Wash. 242.

By our fifth assignment of error we claim that the judgment in this case is erroneous and unjust because the evidence upon the trial of said cause shows that plaintiff's cause of action was barred at the time of the commencement of this action by the statute of limitations of the State of Washington.

The defendant in error testified (Record p 56), that he rendered no service after April, 1912, although in his complaint he does allege that his services were completed June 6th, 1912. The case was begun February 9th, 1916. The cause of action accrued at the close of the rendition of the services.

Blake vs. Pratt, 54 Pac. 806;
Robinson vs. McAfee's Estate, 26 N. W. 643;
City of Seattle vs. Walker, 87 Wash. 609.

The trial court appeared to think that the agency of the defendant in error continued up to July, 1913. We

have shown in our argument upon the preceding point that this is incorrect; neither can that portion of the practice act of 1893, quoted by the trial court in his opinion at page 9 of the record, requiring service to be made within ninety days from filing the complaint, have any application. The fact of the service of process would not toll the running of the statute of limitations. As we have shown by our statute and the cases cited in the Supreme Court of the State of Washington, even if service is made, the statute continues to run until the complaint is filed. Even if it did appear that the defendant in error continued to be the agent of the plaintiff in error after April or June, 1912 (as it clearly does not), that fact would not prevent him from bringing suit. He could have assigned his claim to some third party and service could have been made and the complaint filed.

In the case of *Schubach vs. Redelsheimer's Executors*, 158 Pac. 739, an executor having a claim against the estate which had been rejected by his co-executor, assigned the same to a third party, who brought action against both executors. Judgment was entered in the lower court in favor of defendant upon a demurrer to the complaint. This judgment was reversed. The Supreme Court of the State of Washington, thereby at least impliedly approves such practice.

The legislature has provided certain exceptions in the statute of limitations. The courts cannot add thereto and thereby graft upon the statute exceptions not made by the legislature. Upon this point we also cite the cases cited in our preceding point.

The Cause of Action of Defendant In Error Merged In and Barred by His Former Recovery.

The plaintiff in error offered in evidence, the complaint, answer, reply, findings of fact, conclusions of law, and judgment entered by the Superior Court of King County, Washington, in Cause No. 104397, wherein the parties were the same as in this cause, as defendant's exhibit "A." In connection therewith it was admitted that the judgment was paid and fully satisfied. The complaint in that cause alleges that between November 12th, 1909, and January 5th, 1914, at Seattle, Washington, and Vancouver, B. C., plaintiff

iff rendered services as a "ship's broker," to the defendant at its special instance and request.

The defendant appeared and answered in the Superior Court and after trial the court made findings following the complaint and entered judgment for Ten Hundred and eighty-one (\$1081.00) Dollars and costs. This judgment was thereafter paid.

In the case at bar the allegations of the complaint originally stood that between the 29th day of October, 1910, and the 6th day of June, 1912, in the State of Washington, and the Province of British Columbia, plaintiff rendered services as a "ship's broker" to the defendant.

Upon the trial the complaint was amended by erasing the words "ship's broker," and inserting in lieu thereof the words "ship's agent." It was stipulated between counsel that this amendment should not prejudice the defendant's plea of former recovery (Record p. 23). And before defendant rested it was again stipulated that the amendment of the complaint in the case should not alter the force and effect the judgment of the Superior Court as a bar, if it be otherwise a bar, and that the term "ship's broker" should be considered by the Court to mean the same as "ship's agent" (Record p. 56). It is settled law that if a plaintiff bring an action for a portion of his claim, the recovery of judgment for such portion bars an action for the remainder of his claim.

The difficulty is not as to what the law is upon this subject, but in its application. The courts appear to be agreed upon the proposition that a man may not split his demand; the difficulty arises in distinguishing between a single cause of action and separate or several causes of action.

We submit that the trial court appears in his opinion to have overlooked the stipulation of counsel with regard to the amendment, the court says (Record p. 13):

"There being no evidence as to whether the services for which plaintiff now seeks to recover were those of a broker, rather than a ship's agent, the precise point is not then in issue as to whether such services were those of a ship's broker or not. The term 'ship's agent' is

broader than 'ship's broker.' The latter might be included in the former, but not the former in the latter. The services for which claim is now made being those of an agent, and there being no evidence that they are those of a broker, the burden of establishing such fact, resting upon the defendant, has not been upheld."

The stipulation that the term "ship's agent" and "ship's broker" should be held to be synonymous and to mean the same thing undoubtedly cut off all the evidence offered by the defendant in error and admitted over the objection and exception of the plaintiff in error, as to what was testified to at the trial of the Superior Court.

It would be just as reasonable to admit parol evidence to show in a suit on a promissory note of the same amount and date as one already in judgment, that the first action was in fact upon a different note for a different amount.

If the demand of the defendant in error be considered as a running account between the defendant in error and the plaintiff in error, then clearly the court erred.

It will be observed that the period set up in the Superior Court action embraces all of the period set up in the suit at bar, and the first action is for exactly the same kind of services as the services sued for in the case at bar.

We submit that this case is controlled by

Baird vs. U. S., 96 U. S. 430 L. Ed., Book 24, p 703.

In that case a firm of locomotive builders brought suit in the court of claims against the United States for extras alleged to be due under a contract for the construction of locomotives for the Government during the Civil War. Recovery was had. Subsequently another action was brought against the government to recover different extras not included in the first action, and it was held that the recovery in the first was a bar to the maintenance of the second action.

An attorney was employed by a Mortgage Loan Company to examine abstracts, and upon such examination to

make certificates of title to each abstract, and to render other services. He received an annual retainer for certain services, and rendered bills from time to time for the examination of abstracts: his charges for abstract examination being based upon the amount of the loan. He brought an action to recover a certain sum, and judgment was entered in his favor. He then brought a second action for other and different services which had been rendered before the commencement of the first action, but not sued for therein. The Mortgage Company pleaded the judgment in the first case as a bar to the second, and the answer was sustained upon demurrer in an opinion by Judge Deady. According to the printed report at the end of the opinion the demurrer was sustained; but it is apparent from a reading of the opinion, as well as the report of the succeeding case, that the demurrer was overruled, and that this is merely a misprint.

Hughes vs. Mortgage Co. 26 Fed. 837.

To the same effect is the case of

Lucas vs. LeCompte, 42 Ill. 303.

The services alleged to have been rendered by the defendant in error here closely approximate the services of an attorney-at-law.

A debtor in a large book account gave several notes maturing at different times, covering most of the account, although leaving a small balance. Two of these notes had matured and thereupon suit was brought upon the entire account according to the claim filed, but alleging a balance equal to the two overdue notes, and the small balance not covered by the notes. There was also an indorsement on the plaintiff's declaration to the effect that the amount sued for was the two notes, and the small balance of account. Judgment was taken for the amount of the notes and small balance. In a subsequent action it was held that the first suit barred an action for the balance of the account.

Buck vs. Wilson, 6 Atl. 97.

An action was brought for damages for infringement of patent, and resulted in judgment. Subsequently a bill in

equity was filed for an accounting for other sales not embraced in the first suit, but made prior to the bringing of the first action. Held that the judgment in the first action barred the bill in equity.

Panoulloas vs. National Equipment Co. 198 Fed. 493.

A judgment in an action upon a running account is a bar to another action for a part of the account, although the second action be for items not included in the first action, but due when the first action was commenced.

Bornjesser vs. Harrison, 78 Amer. Dec. 757.

A contract was made for the purchase of a large quantity of lumber at a fixed price, deliveries to be made from time to time. Vendor brought separate actions for separate and several deliveries. Held that this could not be done.

McPhail vs. Johnson, 13 S. E. 799.

Defendant occupied plaintiff's premises for a period in excess of two years agreeing to pay \$37.50 per month. October 31st, 1877, suit was brought to recover for two years ending September 30th, 1877. November 1st, 1877, suit was brought before a Justice of the Peace for \$37.50, for rent for the month of October, 1877. Judgment was obtained in the Justice of the Peace case and was paid. Upon the subsequent trial of the case first brought, it was held that the judgment in the Justice Court was a bar to the recovery of the two years rent, as the plaintiff was bound to include in one action everything that was due.

Burritt vs. Belfy, (Conn.) 36 Amer. Rep. 79.

See also

Memurer vs. Casey, 15 N. W. 877, 23 Cyc. 440.

This court should follow the settled law of the State of Washington, and we submit that it is abundantly settled by the decisions of the Supreme Court of Washington, that the defendant in error cannot maintain this action, as he is barred by his previous action.

Holt Mfg. Co. vs. Coss, 78 Wash. 39.

Gladden vs. Jacobowski, 61 Wash. 242.

Perlus vs. Silver, 71 Wash. 338.

Farwell vs. Brisson, 66 Wash. 305.

International Development Co. vs. Clemans, 66 Wash. 620.

Thompson vs. Washington National Bank, 68 Wash. 42.

Gladwin vs. Chancy, 67 Wash. 151.

Collins vs. Gleason, 47 Wash. 69.

Kline vs. Stein, 46 Wash. 546.

Carmean vs. N. A. T. & T. Co. 45 Wash. 446.

Sweeney vs. Waterhouse & Co. 43 Wash. 613.

The case of *Stern vs. Washington National Bank*, 14 Wash. 511, is particularly in point. That was an action for professional services of an attorney, and it appears from the record that the court withdrew from the consideration of the jury an item for certain services between certain dates. In a subsequent action to recover for the excluded item, it was held that the first action was a bar to the second. We also cite as to this point,

Spokane Valley L. & W. Co. vs. A. B. Jones & Co., 53 Wash. 37.

Schultz vs. Christopher, 65 Wash. 496.

Rosenmueller vs. Lampe, 89 Ill. 212; 31 Amer. Rep. 74.

Hawkins vs. Rebert, 81 Wash. 79.

Krug vs. Hendricks, 54 Wash. 209.

Owners of a patent obtained a decree for a perpetual injunction against an infringement and awarding damages and profits for infringement occurring prior to a given date. A subsequent action was brought to recover damages and profits arising from other acts of infringement committed during the same period, but for which no recovery was asked in the first suit, and no evidence was given on trial. Held that the first action barred the second.

Horton vs. N. Y. Central & H. Ry. Co. 63 Fed. 897.

See also

Claflin & Kimball vs. Mather Elec. Co. 87 Fed 795.

Bucki vs. Atlantic Lbr. Co. 109 Fed. 411.

We submit that the expense account rendered by the defendant in error to the plaintiff in error, and offered in evidence as Exhibit "A," shows plainly that he considered it as one matter. He rendered but one expense account both for the average adjustment matter and the matter of the litigation in British Columbia. He did not segregate his expenses. When the letters and cables from the plaintiff in error to the defendant in error, and vice versa are considered, it will be seen that it was all one employment. The situation of the parties should be borne in mind. Barnaby had been an agent of the Societe from 1907 until 1910, attending to all matters for them; and when the trouble of the Notre Dame d'Arvor arose, the service was an entire one. The attempted division by the defendant in error between the general average matter and the services with regard to the litigation is merely fanciful. The rendering of separate bills cannot help the defendant in error; as well might a merchant having a running account for household necessities, split it up into separate actions, and bring one suit for flour, another for sugar and another for butter, and so on through all the catalogue of groceries. It would clearly be as reasonable for the defendant in error to have sued the plaintiff in error for each trip that he made to Vancouver.

We submit that the services of the defendant in error were all rendered in connection with the troubles of the ship Notre Dame d'Arvor belonging to the plaintiff in error, and that the attempted division into two separate items is fallacious.

In the case of

Morrissey vs. Faucett, 28 Wash. 52

We have a case of services of various kinds, and the Supreme Court of the State of Washington there held that the services were continuous and under a single contract, and that the contract was a continuous one, and the statute of limitations did not begin to run until the completion of the service. The same principle is here applicable. If the contract was an entire one, then the defendant in error is absolutely barred by his recovery in the first action.

We confidently submit that the judgment of the trial

court was erroneous and should be reversed upon this ground alone.

The eighth assignment of error raises the question of the qualifications of the witness, George Stewart Currie, as an expert on the value of the alleged services of the defendant in error. The witness, at page 49 of the record, had testified to his experience in shipping matters, and had shown considerable experience in that line, but none whatever in the line of the preparing such cases for trial. It is to be observed that the defendant in error is suing for services as an expert in assembling and classifying evidence in a trial involving the responsibility for collision damages to cargo. The witness, Currie, did not show that he had ever had any experience in such matters. Our objection, therefore, was well taken. Another question arises as to the testimony of the same witness at pages 50, 51 and 52 of the record. The witness, Currie, was interrogated as to the value of similar services in England, and was allowed to make a comparison of the value of the services alleged to have been rendered by the defendant in error in this country, and in England. The defendant in error at page 52 of the record, was asked a question going into the same matter as complained of in this assignment of error, and forms the basis of our tenth assignment of error. (Record 67 and 68).

We submit that the trial court invaded the rights of the plaintiff in error in permitting this matter to be gone into. It certainly was utterly immaterial what the plaintiff in error paid its representative in London, England, in the litigation over the Raithwaite collision. The testimony given by the witnesses is highly damaging to the plaintiff in error, and could not fail to influence the trial court as is shown by the extravagant award made to the defendant in error.

We submit that this is error requiring the reversal of the judgment.

Our 11th, 12th, 13th, 14th, 15th, 16th, 17th and 18th assignments of error will be considered under the same head; they all cover virtually the same question, namely, the admissibility of the evidence of the defendant in error to the effect that in his first action in the Superior Court

of King County, Washington, he did not sue for the services sued for herein. In the attempt to escape the effect of the allegations of his pleadings, the amendment of complaint at page 23 of record was made. He sued in the first cause for services as "ship's broker" for a period which included the period sued for in the case at bar, for exactly the same services, namely, those of a "ship's broker." It was stipulated at pages 23 and 56 of the record that the term "ship's agent" as used in the complaint in the suit at bar after amendment should be held to mean the same thing; and that the amendment should not prejudice the plaintiff in error's plea of former recovery.

The case at bar is exactly the same as if a plaintiff sued to recover for ten thousand pounds of butter, alleged to have been sold between two dates mentioned in his complaint, and thereafter brought a second suit to recover for five thousand pounds of the same article sold during a portion of the period mentioned in his first complaint. Neither can the case at bar be distinguished from the two cases for Attorney's fees, cited above.

26 Fed. 837.

42 Ill. 303.

It would be just as reasonable to allow a carpenter to sue for each of thirty days wages upon an employment at so much per diem.

An attempt was made in the trial court to distinguish the two cases by reason of the fact that the first action was one in rem. It is true that at the time of beginning the action in the Superior Court, a writ of garnishment was sued out; but garnishment is not a method of beginning an action under the statutes of the State of Washington.

Sec. 220 Rem. & Bal. Code provides that "Civil actions in the several superior courts of this state shall be commenced by the service of a summons, as herein-after provided, or by filing a complaint with the county clerk as Clerk of the Court. * * *"

The provision as to garnishment as found in Sec. 680 is as follows:

"The clerks of the superior courts in the various counties in the state may issue writs of garnishment

returnable to their respective courts in the following cases:

1. Where an original attachment has been issued in accordance with the statutes in relation to attachments;

2. Where the plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid, and that the garnishment applied for is not sued out to injure either the defendant or the garnishee;

3. Where the plaintiff has a judgment wholly or partially unsatisfied in the court from which he seeks to have a writ of garnishment issued."

Sec. 681 provides that, if the writ is issued under subdivision 2, a bond must be given.

Sec. 682 provides for an affidavit by the plaintiff, or someone in his behalf, stating certain facts required to support the issuance of the writ, which in substance are that the plaintiff has reason to believe and does believe that the garnishee, stating name and residence, is indebted to the defendant, or has in his possession or under his control, personal property or effects belonging to the defendant, or that garnishee is an incorporated or joint stock company, and that the defendant is the owner of shares in such company, or has an interest therein.

Then follow provisions for the service of the writ, answer and hearing.

We submit that the garnishment contemplated by the statutes of the State of Washington is mesne process, ancillary and auxiliary to the main case; and in no sense a proceeding in rem.

The reasoning of the trial court, in his opinion at page 12 of the record, upon this subject is fallacious and inconclusive and not in accordance with the settled law.

The defendant in error could have brought his action for the entire amount of his claim for services, and if the plaintiff in error had failed to appear in the Superior Court he could have exhausted the funds garnished, and such garnishment would not have barred his remedy for

the balance not realized. The decision of the trial court was evidently tempered by this consideration as appears from the reading of the memorandum decision at pages 11 and 12 of the record. It is settled law that a failure to realize the entire amount sued for from funds attached or garnished, does not bar the plaintiff's remedy for the balance.

Hochstein vs. Hill, 153 N. Y. Sup. 899.

Smith vs. Curtis, 38 Mich. 393.

Stone vs. Myers, 86 Amer. Dec. 104.

It appears from Exhibit "A" of the plaintiff in error and is an undisputed fact that after the commencement of the suit in the Superior Court, the plaintiff in error appeared. It was perfectly competent for defendant in error then, without any risk to himself, to have amended his complaint to embrace his entire account. The fear manifested by the witness, Mr. Gorham, as attorney for defendant in error, that he might prejudice his client's cause by suing for the entire amount, and not reach sufficient funds by garnishment to accomplish a full satisfaction, is without foundation in the law. The law will not permit the splitting up of a cause of action to suit the convenience or necessity of a plaintiff litigant, or a defendant litigant.

It is the duty of the plaintiff to bring forward his entire cause of action, and of the defendant to bring forward all his defenses. It would be just as reasonable to allow a defendant after waging an unsuccessful defense of set off against a cause of action, to bring another action to set aside the first judgment on the ground that he wanted to interpose a plea of payment, which for some season appearing to him sufficient, he did not interpose in the first cause.

The judgment in this case is grossly excessive. The defendant in error was allowed a sum which would surely be an ample counsel fee for representing the plaintiff in error in the litigation in British Columbia. The defendant in error himself says that his business was yielding him between three and four thousand dollars per annum, when he gave it his undivided attention. It appears from his expense account, defendant's Exhibit "B," that the plaintiff

in error was exceedingly liberal with him in the matter of expenses; and the reading of the evidence of the defendant in error cannot fail to impress the court that the defendant in error has throughout the trial greatly magnified his own services during the progress of the business, and used every opportunity to spend time upon the matter in hand and lay the foundation for future excessive charges.

We submit that if the defendant in error is to recover at all, his recovery should be limited to an amount not exceeding Five Hundred (\$500.00) Dollars. The services of a "ship's broker" or "agent" are not so valuable as to warrant the allowance of any such sum as was here awarded.

Finally, we submit the following propositions:

(A) The judgment should be reversed and the case dismissed for the reason that the cause of action sued upon was at the time of beginning the action, barred by the statute of limitations of the State of Washington.

(B) The judgment should be reversed and the case dismissed for the reason that the cause of action herein sued upon was merged in and barred by the recovery of judgment by the defendant in error against the plaintiff in error in the cause in the Superior Court of King County, Washington.

(C) That the judgment should be reversed and the cause sent back for a new trial for the errors committed by the court in the admission of evidence.

(D) The recovery of the defendant in error, if he is to recover, should be limited to Five Hundred (\$500.00) Dollars.

Respectfully submitted,

JAMES KIEFER,
Attorney for Plaintiff in Error.

**In the United States Circuit
Court of Appeals
for the
Ninth Circuit**

SOCIETE NOUVELLE D'ARMEMENT,
Plaintiff in Error,
vs.
J. R. BARNABY,
Defendant in Error

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN DIVISION

BRIEF OF DEFENDANT IN ERROR,

WILLIAM H. GORHAM,
Attorney for Defendant in Error.

653 Colman Building,
Seattle, Washington.

Filed

FEB 23 1917

F. D. Monckton,
Clerk.

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UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN DIVISION
BRIEF OF DEFENDANT IN ERROR,
STATEMENT OF THE CASE.

This is an action at law.

The complaint alleges that between certain dates the plaintiff rendered services to defendant at its special instance and request in writing. (Tr. record p. 1)

The Answer contained a general denial and two affirmative defenses, one of former recovery;

the other, pleading the statutes of limitation. (Tr. Record pp. 3, 4.)

The trial was to the court under a written stipulation between the parties waiving a jury. (Tr. Record p. 6.)

In his opening statement, counsel for plaintiff stated that plaintiff relied upon certain letters as evidencing the contract of employment but containing no direct promise of compensation for the services and mentioning no sum agreed to be paid plaintiff and that evidence would be offered of the reasonable value of the services rendered. (Tr. Record pp. 23, 24.)

Thereupon counsel for defendant objected to the introduction of any evidence in support of the complaint, for the reason that it was apparent from the record that the action was barred by the statute of limitation of the state of Washington. (Tr. Record p. 24.)

The court declined to rule at that time, reserving the question for consideration on final argument; and thereupon it was agreed between counsel in open court that all of the plaintiff's evidence should go in subject to this objection, and that the defendant should not waive it by offering testimony on its own behalf. *Id.*

At the close of the plaintiff's case in chief, defendant proceeded to put in its case without the intervention of any motion or any request on its part for a declaration of law.

At the close of all the testimony both parties rested; whereupon, upon oral argument, plaintiff's counsel contended that under all the evidence in the case plaintiff was entitled to judgment; and defendant's counsel contended (a) that his objections to the admission of any evidence in support of the complaint must be sustained, and (b) the evidence stricken, and further (c) that in any event under all the evidence in the case defendant was entitled to judgment.

Thereupon the cause was taken under advisement by the court. (Tr. Record p. 65.)

Thereafter the court made a general finding in favor of the plaintiff in the sum of \$4,000 and interest, and judgment was rendered agreeably to the general finding, the judgment reciting, among other things, as follows:

"the parties having joined in a request for special findings and that neither party having served his draft findings or delivered the same to the clerk of the court for the presiding judge at said trial, and the time within which the defendant as the losing party has under the Rules of this court to serve its draft findings and deliver the same to the clerk for the presiding judge at said trial hav-

ing expired and the plaintiff having in open court waived his right to special findings and the court having found the issue for the plaintiff in the sum of'' etc. (Tr. Record p. 15.)

Thereafter a bill of exceptions was duly settled and certified by the trial judge and ordered filed. (Tr. Record pp. 23-26.)

Thereafter, defendant as plaintiff in error petitioned for an order allowing a writ of error and fixing the amount of the supersedeas and an order was duly entered allowing the writ of error and fixing the amount of the supersedeas. (Tr. Record pp. 21, 22.)

An assignment of Errors was duly filed simultaneously with the petition for writ of error. (Tr. Record pp. 66-71.)

ARGUMENT.

POINT I.

Only exceptions to rulings of the trial court, made at the time at the trial and duly presented in the Bill of Exceptions, can be considered by this court on review.

The finding of fact by the court being general, the review by this court can only extend to rulings of the trial court in the progress of the trial and

then only when excepted to at the time and duly presented by a bill of exceptions.

R. S. U. S. Sec. 700.

Kelly v. Ophir H. C. Mg. Co., 169 Fed. 598.

Marinette Sawmill Co. v. Scofield, 174 Fed. 562.

Webb v. Nat. Bank, 146 Fed. 718.

Streeter v. Sanitary Dist., 133 Fed. 127.

Paul v. Delaware, etc. Co., 130 Fed. 951.

The statement of the court in its opinion on the merits as to the effect of the evidence does not fall within "rulings" as contained in the R. S. U. S. sec. 700.

Moser v. Smith, 191 Fed. 502.

Keely v. Ophir, etc. Co., *supra*.

Streeter v. Sanitary Dist., *supra*.

Bell v. R. R. Co., 194 Fed. 366.

Steinhauser v. Order St. Benedict, 194 Fed. 289.

The assignments of plaintiff in error that there is no evidence to support the judgment being a

question of law cannot be reviewed here unless presented to, and passed on by, the trial court by some appropriate action during the trial, unless the finding is entirely without any evidence to support it.

Steinhauser v. Order St. Benedict, supra.

It is true that the plaintiff in error had an exception to the general finding of the trial court incorporated in that finding; but an exception to the general finding by the court for the plaintiff, upon the evidence adduced at the trial, not raised or presented in the Bill of Exceptions, presents no question of law which the appellate court can review.

Town of Martinton v. Fairbanks, 112 U. S.
670

Phoenix Securities Co. v. Dittmar, 224 Fed.
893, 9th C. C. A.

This rule, so thoroughly established and followed, disposes of the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Assignments of Error, for none of these assignments is based upon an exception to a ruling of the court during the trial, excepted to at the time and duly presented in the Bill of Exceptions.

Assignments of Error, 8th to the 18th inclusive, are based upon rulings of the court in the progress of the trial, excepted to at the time and duly presented in the Bill of Exceptions.

We will answer the argument of counsel for plaintiff in error in support of his contentions in the order in which they appear in his opening brief.

POINT II.

Fourth Assignment of Error.

Alleged error in overruling the objection of defendant to reception or introduction of any evidence to support the plaintiff's complaint. (Tr. Record p. 66. Plaintiff in Error's Brief p. 9.)

There was no ruling by the trial court on this objection; the objection was made at the close of the opening statement of plaintiff and ruling thereon reserved; at the close of the testimony defendant renewed his objection, and that objection together with the case on its merits was taken under advisement by the court. Nor was there, either at the close of plaintiff's case or at the close of the testimony, any exception taken at the time by defendant for failure of the court to rule on the objection; and no exception is presented in the Bill of Exceptions, covering the objection set out in the 4th Assignment of Error.

That the court finally disposed of this objection adversely to defendant is manifest by the general finding in favor of plaintiff; and in that general finding is written the exception of defendant

thereto; but no exception thereto is raised and presented in the Bill of Exceptions for review by this court; and, as we have seen under the First Point, an error urged, not presented in the Bill of Exceptions, cannot be reviewed by this court.

Should the court not take this view of the law governing review on writ of error, we submit as a further answer to contention of plaintiff in error:

The theory of plaintiff in error in respect of the 4th Assignment of Error is: That the complaint alleges plaintiff rendered services between October 29, 1910 and June 6, 1912; at defendant's special instance and request in writing, which writing, consisting of letters, counsel admitted in his opening statement at the trial, contained no express promise of compensation for the services and mentioned no sum agreed upon to be paid plaintiff and stated that evidence would be offered of the reasonable value of the services so rendered; that in such case, nothing appearing in the contract sued upon as to price or compensation, which was an essential element of the contract, resort must be had to oral testimony; and thus the contract would be in part oral and in part written and therefore an oral contract, on which the statutes of limitation of the state of Washington would run as follows:

“Upon a contract or liability express or implied, which is not in writing and does not arise

out of any written instrument," three years. Sec. 159 Remington's 1915 Washington Code, subd. 3.

But the statutes of limitation of Washington further provide that "an action upon a contract in writing or liability express or implied arising out of a written agreement," may be commenced within six years. Sec. 157, subd. 2, Remington's 1915 Washington Code.

Subd. 2 of Sec. 157 has been construed by the Supreme Court of the State of Washington in *Caldwell v. Hurley*, 41 Wash. 296, where the court said:

"said subdivision 2 * * * differs from the statutes of limitation of most if not all the other states. In fact, after a painstaking research we have found no similar statute. The peculiar feature of our statute is that an implied liability arising out of a written instrument is included in the same clause with an express liability arising out of a written contract. The legislature evidently thereby intended that a certain class of actions should be included within the terms of said section which had not in other states been associated or connected with actions on written instruments or actions founded upon written agreements."

This brings the cause of action in the case at bar within subd. 2 of Sec. 157, *supra*, providing a limit of six years for the commencement of suit.

Nor do we consider the cas of *Ingalls v. Angell*, 76 Wash. 692, cited in Brief of plaintiff in error, p. 12, overrules *Caldwell v. Hurley, supra*. In *Ingalls v. Angell, supra*, the court in discussing the question of limitation said:

“The first question to be determined is whether the six-year or the three-year statute of limitation applies to the contract as pleaded. An action upon a contract in writing, or liability express or implied, arising out of a written *contract*, may be begun within a period of six years.” (Italics ours). But the language thus referred to is not the language of the statute. The statute provides:

“An action upon a *contract* in writing, or liability express or implied, arising out of a written *agreement*,” may be commenced within six years (Italics ours).

Furthermore, an examination of the case itself, discloses that the opinion so far as it relates to limitation of the action is dictum for the court found the cause of action in fact accrued within three years.

In view of the peculiarity of the statutes of limitation of the state of Washington and the statement by the Supreme Court of that state that no similar statute could be found after a painstaking research, a review of the cases from other states, cited by plaintiff in error in its brief in discussing

the 4th Assignment of Error, will in our opinion, not be illuminating.

POINT III.

Fifth Assignment of Error.

That the evidence upon the trial shows that plaintiff's cause of action was barred at the time of the commencement of the action by the statutes of limitation of the state of Washington. (Tr. Record p. 66. Plaintiff in Error's Brief, p. 14.)

Neither at the close of plaintiff's case nor at the close of all the testimony, was there any ruling by the court, excepted to by defendant upon a motion for judgment or a challenge to the sufficiency of the evidence or a request for a declaration of law, which fairly presented the issue of law raised by the 5th Assignment of Error, as to whether or not, on the plaintiff's case or on all of the testimony, a judgment could be sustained in favor of plaintiff; and no exception is presented in the Bill of Exceptions to any ruling of the court or failure of the court to rule, based on the legal proposition that the evidence of the case shows that the statute had run, at the time of the commencement of this action.

The 5th Assignment of Error cannot be reviewed if we are right in our statement of the law in our First Point.

Should the court not take this view, then we submit:

That the statutes of limitation were pleaded as an affirmative defense by defendenat. (Tr. Record p. 4); and denied by plaintiff's reply (Tr. Record p. 5.)

The running of the statute was thus an issue raised by the pleadings and that issue was decided in favor of plaintiff by the general finding.

Further, the complaint alleges that defendant maintained a general agency at Seattle during three years last past, i. e. immediately preceding the commencement of the action. Captain Jolivet for defendant testified at the trial, in July 1916, that he had been agent for three years. (Tr. Record p. 55.) Plaintiff in Error admits in its opening brief "that Jolivet succeeded defendant in error" in such agency (p. 13, lines 6-8.)

And it appears from the testimony contained in the Bill of Exceptions, if the evidence is to be considered by this court in reviewing this 5th Assignment of Error, that plaintiff testified that he had been agent of defendant at Seattle continuously up to about the time this difficulty arose early in 1912, to about April 1912. (Tr. Record p. 56.)

All of which amounts to this: That plaintiff's agency and that of ~~P~~^Jolivet extended back more than

three years prior to the commencement of this action.

After the defendant had closed its testimony, it thereupon rested "with the understanding that the amendment of the complaint in the case at bar to read 'ship's agent' should not alter the force and effect of the judgment of the Superior Court as a bar, if it be otherwise a bar, that the term 'ship's broker' (in the complaint in the former suit) should be considered by the court to mean the same as ship's agent." This was conceded by the plaintiff. (Bill of Exceptions, Tr. Record p. 56.)

Counsel for plaintiff in error, at page 13 of his brief, referring to the testimony of Captain Jolivet, given at the time of the trial, July 1916, in the case at bar, that he had acted as agent for plaintiff in error for three years, argues: "For aught that appears he might have been agent of the plaintiff in error for three years and ten or eleven months. It is admitted that Captain Jolivet succeeded the defendant in error."

That is to say that Captain Jolivet, in using the words "three years" meant "three years, more or less."

And if it can be considered that Captain Jolivet meant three years more or less, it might be *less* quite as well as more. In which case, the apparent hiatus between the agency of defendant in error and

of Captain Jolivet is closed up by the allegation of the complaint and the finding of fact, in the former suit, that the plaintiff rendered services as ship's broker (that is: ship's agent) between November 12, 1909 and January 5, 1914. (Plaintiff in Error's Exhibit "A". Plaintiff in Error's Brief p. 15.)

But during plaintiff's agency, the statutes of limitation were suspended as to this action of plaintiff against defendant.

Where service of process is made upon an officer or agent who, although within the terms of the statute, sustains such relation to plaintiff or the claim in suit as to make it to his interest to suppress the fact of service, such service is unauthorized.

32 Cyc. 554.

People v. Lafferty, 96 N. E. 1052.

Service of process will not be sustained where it is upon a person who is a party plaintiff.

111 Ills. 32.

103 Ills. 472.

It is not sufficient service of a writ against a corporation to serve the same upon the plaintiff, as president of the corporation.

Buch v. Mfg. Co., 4 Allen (Mass.) 357.

It would not have availed plaintiff to have assigned his claim for the purpose of having action brought on such assigned claim by service of process in such action upon plaintiff, as agent for defendant.

In an action against a corporation on an assigned claim for personal services, service of process on the assignor, as an officer of the corporation, was held invalid.

Atwood v. Power Co., 111 N. W. (Mich.) 747.

One interested in the recovery of a loss on a fire insurance policy cannot be considered the Company's agent so that citation served upon him as such agent will bind the Company.

No. Br. & M. Ins. Co., v. Storms, 24 S. W. (Tex.) 1122.

The case of *Schubach v. Redelsheimer's Executors*, 158 Pac. 739 (Wash.) cited by plaintiff in error in discussing its 5th Assignment of Error, Brief p. 15, does not support its contention that defendant in error could have assigned his claim and that in an action by his assignee, service of summons could have been made upon plaintiff in error by serving defendant in error, as agent. That was a case of an executor, whose claim against the estate having been presented and rejected by his co-executor, assigning his claim to a third party who brought an action upon the assigned claim against both executors, and the court said:

“When Moyses (one of the executors) presented his claim to his co-executor, he did so as a claimant against the estate. It was not as if he had been sole executor. His co-executor could pass on the claim as fully as if she were the sole executrix and he a claimant merely.”

No inference can be drawn from the language of the court that, if Moyses had been sole executor, he could have assigned his claim and such assignee could have either presented the assigned claim for allowance by Moyses as executor; or after rejection could have commenced action on the assigned claim against Moyses as executor and acquired jurisdiction by service of summons on Moyses, as executor. The statutes of the state of Washington provide, that where the executor or administrator is himself a creditor of the testator or intestate, his claim shall be presented for allowance or rejection to the judge of the court. Sec. 1487, Remington's 1915 Code of Washington.

This suspension of the statute of limitation in the instance case continued until Jolivet succeeded plaintiff as defendant's agent in July 1913 and three years had not run after the appointment of Jolivet and before the commencement of the action in February 1916.

Assuming, but not admitting, that plaintiff's cause of action was upon a contract or liability, express or implied, which was not in writing, and did

not arise out of a written instrument, which would toll the statute in three years, still the action was not barred by the statute, because of the suspension of the running of the statute during plaintiff's agency.

For Sec. 168 of Remington's 1915 Washington Code provides that if the cause of action shall accrue against any person who shall be out of the state * * * such action may be commenced within the terms therein respectively limited, after the return of such person into the state.

For the purpose of an action on plaintiff's claim against defendant, the defendant is to be considered as withdrawn from the state during plaintiff's agency.

POINT IV.

6th and 7th Assignments of Errors.

(a) That the evidence shows that the cause of action in plaintiff's complaint was merged in and barred by a judgment in a former suit in the state court.

(b) That the evidence shows that plaintiff recovered or ought to have recovered or would in law recover all of his demands against defendant for which he has herein sued, in the former action in the state court. (Tr. Record p. 67. Pltt. in Error's Brief p. 15.)

There was on the part of defendant, at the trial, no motion for judgment or a request for a declaration of law or any other action which fairly presented to the court the issue of law whether or not the action herein was barred by a former recovery.

There was no ruling of the court on any such issue of law, no exception therefor, to such ruling, or for a failure to make such ruling, and no such exception is presented by the Bill of Exceptions, respecting the matters included in the 6th or 7th Assignment of Errors. For reasons given in our First Point the 6th and 7th Assignment of Errors cannot be reviewed by this court.

Should the court not take this view of the law, we submit:

That the bar of a former recovery was pleaded by defendant as an affirmative defense. (Tr. Record p. 4), and denied by plaintiff in his reply, (Tr. Record p. 5). The issue thus joined was decided in favor of plaintiff by the general finding.

Further, it appears from the testimony in the Bill of Exceptions, if the evidence is to be considered by this court in reviewing the 6th and 7th Assignments of Error, that plaintiff brought an action in the state court of Washington in 1914 for services rendered defendant in matters of general average and recovered therein the sum of \$1,000, upon a

written instrument other than and separate from the instrument upon which the cause of action in the instant case is founded. Plaintiff in Error admitted at the trial that the recovery in the former suit was on the General Average bill, in evidence in the instance case as plaintiff's exhibit No. 20, and that this bill for \$1,000 for General Average services was offered in evidence in the former suit to support the same. (Tr. Record p. 57.) And plaintiff in error contends in his opening brief, in the instance case, that defendant in error is suing in the instance case for services as an expert in assembling and classifying evidence in a trial involving the responsibility for collision damages to cargo. (Tr. Record p. 22, lines 9-13.) It further appears from the testimony in the Bill of Exceptions that the General Average services involved matters occurring prior to the arrival of defendant's ship *Notre Dame d'Aror* on our Western Coast and the services in the instance case concerned matters occurring after that arrival. (Tr. Record p. 61.) The two services were rendered under different instruments, involved totally different matters, for each of which a separate account was kept and rendered, by plaintiff. (Tr. Record p. 60.)

In *Stark v. Starr*, 94 U. S. 477, it was said:

It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or

proof or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible. But this principle does not require distinct causes of action, that is to say, distinct matters, each of which would authorize by itself independent relief, to be presented in a single suit, though they exist at the same time and might be considered together.

And in the Haytian Republic, 154 U. S. 118 at 125, the court, after quoting from *Stark v. Starr*, *supra*, as above, added:

The qualification states the elementary rule. One of the tests laid down for the purpose of determining whether or not the causes of action should have been joined in one suit is whether the evidence necessary to prove one cause of action would have established the other."

The record in the Bill of Exceptions shows that the testimony in the state case was in support of compensation for general average services and no other (Tr. Record p. 58,) under an instrument separate and distinct from the instrument in the instance case and for services on matters not involved in the instance case but arising long prior to

the matters involved in the instance case; while the testimony in the instance case would not support a claim for general average services at all. This is the test as declared in the Haytian Republic case, *supra*.

In view of the rule in *Stark v. Starr, supra*, and in the *Haytian Republic, supra*, and the facts of the instance case and of the state case, as disclosed by the bill of exceptions, we do not consider it necessary to discuss the authorities cited by plaintiff in error under his 5th Assignment of Error.

POINT V.

8th Assignment of Error.

Alleged error in the admission of testimony of plaintiff's witness Currie on the value of plaintiff's services, over objection of defendant on ground of incompetency, (Tr. Record p. 67. Pltff. in Error's Brief p. 22.)

This alleged error was duly raised and presented in the Bill of Exceptions.

Plaintiff in error admits, (Brief p. 22,) that this witness had shown considerable experience in shipping matters but contends that he had shown no experience whatever in the line of preparing such cases for trial.

We submit that the witness Currie's admitted "considerable experience" was sufficient to qualify

him to testify as to the reasonable value of plaintiff's services in the instance case.

The bare objection of defendant's counsel at the trial that the witness had not shown that he was engaged in or had any knowledge of similar cases and therefore had not shown himself qualified to answer the questions included in the 8th Assignment of Error, does not carry with it any conclusion that the witness had not properly qualified himself by his testimony. Statement of counsel to the effect that the witness had not qualified himself, in itself, of course, would carry no presumption in its favor. And this court cannot say from the bare question objected to, the objection, ruling, exception, and answer to the question, whether or not the witness was qualified and whether or not the ruling of the court was error.

If the whole evidence as contained in the Bill of Exception is to be considered by this court in reviewing this 8th Assignment of Error, then we submit that the admission of the testimony complained of was proper because the witness had shown himself qualified to express an opinion as to the value of plaintiff's services.

Further we submit, that if there was error, it was without prejudice to defendant; because of the fact that there was abundant testimony of competent witnesses on behalf of plaintiff to prove the value of plaintiff's services and support the finding and

judgment. See in Bill of Exceptions, testimony of Captain Copp, who fixed the value of those services at from five to six thousand dollars; (Tr. Record p. 47) testimony of Captain Stuart, who fixed that value at one thousand pounds, sterling, say \$5000; (Tr. Record p. 48) Mr. Thorndyke, who fixed that value at five to six thousand dollars, (Tr. Record p. 53) the plaintiff, who fixed the value for the purposes of this case at \$5000, (Tr. Record p. 41).

The witness Currie fixed the value, in his answer to the question objected to, at from six to seven thousand dollars. The court awarded the sum of \$4,000.

The excepting party must make it manifest that an error prejudicial to him has occurred in the trial in order to justify an appellate court disturbing the general finding.

Cunningham v. Springer, 204 U. S. 647, 652.

The burden of showing prejudicial error is upon the plaintiff in error and no such showing has been made. On the contrary we submit that it is affirmatively shown by the record that the admission of the testimony objected to was without prejudice, to the defendant.

POINT VI.

9th Assignment of Error.

Alleged error in the admission of testimony of plaintiff as to relative values of like service in

England and in British Columbia and Seattle. (Tr. Record pp. 51 and 67. Pltff. in Error's Brief, p. 22).

This alleged error was duly raised and presented in the Bill of Exceptions.

A witness for plaintiff was asked what was the relative value of like service in England and British Columbia and Seattle and testified the value was much higher here than in England, at a ratio of two and one half to one. (Tr. Record p. 51).

The burden is on the excepting party to show prejudicial error.

Cunningham v. Springer, 204 U. S. 647, 652.

That burden the plaintiff in error has not discharged.

We submit that if there was error, it was without prejudice to plaintiff in error. There was nothing before the court, as disclosed by the record of the testimony in the Bill of Exceptions, showing what would have been charged for similar service in England and the fact that such services here were worth two and one-half times more than in England could in no way fix the value here, without a criterion which was wanting.

Furthermore, the court awarded plaintiff \$4000 as against \$6000. to \$7000. testified to by this witness as the value of the services rendered.

POINT VII.

10th Assignment of Error.

Alleged error in admitting bill of broker in London for services rendered on collision, plaintiff's exhibit No. 21. (Tr. Record pp. 52 and 68; Pltff. in Error's Brief p. 22.)

This alleged error was duly raised and presented in the Bill of Exceptions.

What was said in Point VI as to the 9th Assignment of Error, may be considered as repeated here as to the 10th Assignment of Error.

The amount of the bill of the London agent had no bearing upon the value of plaintiff's services at Seattle and British Columbia and its admission was without prejudice to plaintiff in error. The trial court itself characterized it as "rather far fetched." (Bill of Exceptions, Tr. Record p. 5, line 14.)

That bill, plaintiff's exhibit No. 21, was for services during a period of four months and was for £400 or say \$2000. Notwithstanding the comparison made between values of services here and in England, as two and one half times greater here than in England, the court as a mater of fact found for plaintiff in the sum of \$4000 for services covering a period of over one year and eight months; plaintiff testified that the time actually occupied by him,

if boiled down, would amount to one year, of eight hours a day. (Tr. Record p. 39, lines 9-14) Plaintiff further testified that his net earnings were three to four thousand dollars a year. (Tr. Record p. 42). It is evident that it was this testimony as to time actually employed and the earning capacity of plaintiff at Seattle, that formed the basis of the court's finding in favor of plaintiff in the sum of \$4000, and not the testimony of Currie as to relative values or the London agent's bill of Exhibit No. 21, and that the admission of the agent's bill was without prejudice to plaintiff in error.

As applicable generally to the 8th, 9th and 10th Assignments of Error, the admission of alleged incompetent and immaterial evidence, the Supreme Court in *Holmes v. Goldsmith*, 147 U. S. 150, said:

“The modern tendency, both of legislation and of the decision of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are specially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has been thereby caused.”

To the same effect, *Press Pub. Co. v. Monteith*, 180 Fed. 356 at 362, 2nd C. C. A.

This court in *U. S. v. Honolulu Plantation Co.*, 122 Fed. at 583, said:

“Material evidence erroneously admitted in a trial before a *jury* is always reversible error, unless it can be properly said that such admission was without doubt, without injury.”

The erroneous admission of evidence was harmless where the same facts were shown by proper evidence.

Smith v. Township of Au Gres, 150 Fed. 257.

Crichfield v. Julia, 147 Fed. 25.

The error, if any, in admitting evidence of a fact established by evidence received without objection, is harmless.

St. Louis, etc. Co. v. Duke, 192 Fed. 306.

Unless it can be shown that prejudice has resulted from error of the trial court prejudice will not be presumed.

Hoogendorn v. Daniel, 202 Fed. 431 9th C.
C. A.

In the case at bar the trial was *to the court* and it can hardly be said that opinion evidence by a witness, as to the value of services, is prejudicial, because of incompetency of the witness, where the trial judge was advised as to the degree of qualification of the witness; or where other expert witnesses, whose testimony on the question of value of

service was received without objection, testified as to the value of those services in an amount in excess of the award made by the court.

POINT VIII.

11th and 18th Assignments of Error.

Alleged error in the admission of evidence for defendant in error detailing the evidence offered in former suit in support of his cause of action in that suit and to the effect that in the former suit he did not sue for the services sued for in the instance suit. (Tr. Record pp. 58, 59, 60, 61, 62, 63, 68, 69, 70. Pltff. in Error's Brief p. 22.)

It will be remembered that one of the affirmative defenses of plaintiff in error in the instance case was former recovery which was denied by defendant in error. The issue thus joined was decided in favor of defendant in error by the general finding.

It appears from the testimony contained in the Bill of Exceptions that, in support of that affirmative defense, plaintiff in error offered in evidence Exhibit A, being the complaint, answer, reply, findings of fact, conclusions of law and judgment in the former suit and it was admitted that the judgment was paid in full; and that in rebuttal the defendant in error took the witness stand and testified respecting the former suit, identified Exhibit

No. 22 as the account on which he recovered in that former suit, (Tr. Record p. 56), the basis of his complaint and recovery in the former suit, (Tr. Record p. 57); that plaintiff in error admitted as a fact that the recovery in the former suit was on the general average bill, Exhibit No. 22 herein, and that that was the bill evidence was offered in the former suit to support, (Tr. Record p. 57); defendant in error further testified that he was present at the trial of former suit and was the main witness for plaintiff in that suit; that he alone had knowledge of the particular facts upon which recovery could be had, (Tr. Record p. 58); that Exhibit No. 23 is the letter containing instructions from plaintiff in error to defendant in error to take charge of the general average matters. (Tr. Record p. 59;) that separate and distinct accounts of the services in the general average matter, the basis of recovery in the former suit, and of services involved in the instance case were kept and rendered by defendant in error, (Tr. Record p. 60;) and that "the general average agency services referred to are facts occurring prior to the arrival of the ship in Seattle and the matters I testified to this morning and afternoon (in the instance case), for which I am now claiming compensation are for services rendered subsequent to the arrival of the vessel at Seattle and concern matters occurring after the arrival of the vessel, that is the line of demarcation." (Tr. Record p. 61).

In view of the issues raised by the pleadings on the question of former recovery, the testimony of the defendant in error which was sought by the questions, objections to which form the bases of Assignments of Error 11th to 17th, inclusive, was competent and material.

There was no other way of determining the issues in the instance case regarding the defense of former recovery than by calling witnesses who attended the trial of the former suit. If the testimony of such witness in the instance case was inaccurate or untrue, plaintiff in error, on its rebuttal, could have shown such inaccuracy or untruth. That such could not be shown is manifest from the admission by plaintiff in error that the recovery in the former suit was on the bill of \$1000 for general average services and that the bill offered in evidence in the instance case as Exhibit No. 22 was the bill offered in evidence to support the cause of action in the former suit. (Tr. Record p. 57.)

While on the other hand, it is contended by plaintiff in error in his brief that in the instance case defendant in error is suing for services as an expert in assembling and classifying evidence in a trial involving the responsibility for collision damages to cargo. (Pltff. in Error's Brief, p. 22.)

The test laid down in *Stark v. Starr*, *supra*, and the *Haytian Republic*, *supra*, for the purpose of determining whether or not the causes of action in the

former suit and in the instance case should have been joined in one suit, i. e. whether the evidence necessary to prove one cause of action would have established the other, determines the admissibility of the testimony as material and competent, which admission is objected to and urged as error by the Assignments of Error, 11th to 17th inclusive.

As to the 18th Assignment of Error, the objection complained of is only to the first ten lines of the testimony of witness Gorham. (Tr. Record p. 63). There is nothing in those ten lines which is in any way prejudicial to plaintiff in error. The balance of the testimony of that witness on pages 63 and on page 64, all within the Bill of Exceptions was not objected to and no error can be predicated upon testimony not admitted over an objection. Plaintiff in Error may have intended that his objection should cover all of the statement of this witness but the record does not disclose any such intention.

We submit that the objections to the several questions in the 11th to the 17th Assignments of Error and to the testimony in the 18th Assignment of Error, were not well taken, that the rulings of the court overruling the objections were without error and that, even if there were error, such error was not prejudicial to plaintiff in error.

The burden is on the excepting party to show prejudicial error.

Cunningham v. Springer, 204 U. S. 647, 652.

The plaintiff in error has not discharged that burden.

Admission of extrinsic evidence to show precise matters raised and determined in former suit:

In the instance case the complaint alleges, paragraph III, that between November 29, 1910 and June 6, 1912, in the State of Washington and the Province of British Columbia, plaintiff rendered services as a ship's agent to defendant at its special instance and request in writing.

The answer to that complaint alleges, in its first affirmative defense: (1) That on October 22nd, 1914, plaintiff began an action in the Superior Court of King County, State of Washington, against defendant for the same cause of action, the same services and upon the same contract pleaded herein and covering the same transactions; in which former action defendant appeared, issue was joined, trial had and judgment entered in favor of plaintiff in the sum of \$1081 and costs and judgment was thereafter paid in full (par. I;); (2) That in order to sustain his cause of action in the state court plaintiff offered evidence of the same transactions as are referred to and relied upon herein and in plaintiff's bill of particulars herein, and that all matters mentioned in plaintiff's complaint herein and in his bill of particulars herein, were litigated and should have been litigated in the former suit (par. II);

The plaintiff in its reply made a general denial of the allegations of that first affirmative defense.

Thus the issues were joined.

It was the duty of the court to admit testimony on these issues.

At the trial, in support of its first affirmative defense, defendant offered in evidence the complaint, answer, reply, findings of fact, conclusions of law and judgment in the former suit, defendant's Exhibit A; and it was admitted that that judgment had been paid.

This complaint and the findings of fact in the former suit, alleges and recites, respectively: That between the 11th day of November, 1910, and the 5th day of January 1914, at Seattle, Washington, and Vancouver, British Columbia, plaintiff rendered services as a ship broker to defendant at its special instance and request in writing.

No further evidence was offered on the part of defendant in support of its first affirmative defense.

Thereupon the plaintiff in rebuttal, in view of the issues of fact joined by the first affirmative defense and the reply, offered testimony showing: (1) That the services involved in the instance case were not the same services as were involved in the former suit, (2) nor upon the same contract; (3) nor covering the same transactions; (4) that the evidence of-

ferred by plaintiff in the former suit was not of the same transactions as are referred to and relied upon in the instance case and in his bill of particulars in the instance case; (5) that the matters mentioned in plaintiff's complaint in the instance case and in his bill of particulars in the instance case were not litigated in the former suit.

Part of the evidence so offered by plaintiff was objected to by defendant, its objections overruled and exceptions thereto properly preserved and presented in the Bill of Exceptions under the 11th to the 18th Specifications of Error.

We submit that upon the face of the complaint in the instance case and of the complaint in the former suit, without respect to any distinction as to the phrases "ship broker" and "ship's agent," the causes of action respectively stated therein, are not the same; and for that reason the judgment in the former suit is no bar to recovery herein.

But in view of the issues tendered, in view of the very particularity of the allegations of both the first and second paragraphs of the first affirmative defense in defendant's answer, denied by plaintiff's reply, we submit that it was proper for the trial court to admit extrinsic evidence on the part of plaintiff on such issues.

Where former recovery is pleaded, it can be shown in the second suit by parol evidence what was

tried in the first, whenever it becomes necessary to do so.

Campbell v. Rankin, 98 U. S. 261.

“It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit.”

Russell v. Place, 94 U. S. 606.

The case of *Russell v. Place*, *supra*, was followed by this court in *Lim Jew v. U. S.*, 196 Fed. 736, wherein it was said:

“It is also settled law that a judgment upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties; but to have this operation it must appear from the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit. Any uncertainty on this head must be dispelled by extrinsic proof; otherwise the entire subject-matter of the action will be set at large upon the new contention.”

The issues tendered by the first affirmative defense of the answer and met by denial in the reply, raise such an “uncertainty” in the case at bar.

The admission of the testimony objected to, covered by the 11th to the 18th Assignments of Error, even if error, was without prejudice to plaintiff because there was sufficient other evidence, not objected to or if objected to, exceptions not taken in Bill of Exceptions, admitted to support the issues on the question at bar in favor of plaintiff.

St. Louis, etc., Co. v. Duke, supra.

We submit that the judgment of the lower court should be affirmed.

WILLIAM H. GORHAM,

Attorney for Defendant in Error.

**In the United States Circuit
Court of Appeals**

For the Ninth Circuit

SOCIETE NOUVELLE D'ARMEMENT,
Plaintiff in Error,

vs.

J. R. BARNABY, Defendant in Error,

PETITION FOR REHEARING

JAMES KIEFER,
Attorney for Plaintiff in Error.

In the United States Circuit Court of Appeals

For the Ninth Circuit

SOCIETE NOUVELLE D'ARMEMENT,
Plaintiff in Error,

vs.

J. R. BARNABY, Defendant in Error,

PETITION FOR REHEARING

To the Honorable, the Judges of the above entitled
Court:

The plaintiff in error respectfully petitions the
Court to grant a rehearing and reargument of this
case upon the following grounds:

I.

The court, at page 7 of the opinion filed treats
of the objection of plaintiff in error to the introduc-
tion of evidence, not in the light of the record as it

existed at the time when the objection was made but in the light of the evidence thereafter introduced over such objection. We submit that this must have been an inadvertence on the part of the court. The objection of the plaintiff in error should have been considered and disposed of upon the record as it stood when it was made. The record as it then stood contains the plain and unmistakable allegation in the complaint that "during said three years last past the defendant has maintained and is now maintaining a general agent at Seattle, Washington, for the more convenient transaction of its business in said state." It also contains a further allegation in the following paragraph of the complaint that the defendant in error had ceased to be the agent of plaintiff in error on June 6th, 1912. The allegation of maintaining an agency which we have quoted above was admitted in the answer of the plaintiff in error. This allegation of the defendant in error as to said agency is to be taken as a conclusive judicial admission and no evidence was proper to be received under it.

Wulff vs. Manuel, 23 Pac. 723.

J. Hendy Machine Works vs. Pacific Cable Construction Co., 33 Pac. 1084.

It is the established rule of law that facts admitted in the pleadings are equivalent to findings made by the court and are equally conclusive.

Miller vs. Head Camp W. O. W., 77 Pac. 83.

A party cannot contradict judicial allegations of his petition to the prejudice of his adversary who has in good faith accepted and acted on them.

State vs. Judges of Appeals, etc., 34 La. Ann. 1220.

An averment of title in respondents, declaring title to be in respondents found in a petition for condemnation, is conclusive upon petitioner and respondents need not prove their title.

Sanitary District vs. Chicago, etc., Ry. Company, 75 N. E. 248.

Where facts are admitted in the pleadings no proof is necessary or proper.

Scheldt vs. Board of Com., 122 Pac. 910.

We submit, therefore, that the allegation in the complaint of the defendant in error was absolutely binding upon him. This view is further strengthened by consideration of plaintiff's Exhibit 24, offered in evidence Record 64, and the testimony of the witness Gorham. An examination of Exhibit 24 will dis-

close that on October 14th, 1914, the defendant in error and the plaintiff in error stipulated that for three years prior to that time plaintiff in error had been represented by an agent and had maintained an office in the City of Seattle. When defendant in error was called for further interrogation, upon cross-examination by Mr. Kiefer he testified, that he was agent for defendant in Seattle continuously from 1907 up to about the time this controversy over his compensation arose early in 1912, about April, 1912.

An examination of the record, page 55, will disclose that the testimony of Captain Jolivet was not offered upon this question and was not so received by the court or so considered by either counsel. Captain Jolivet had been asked concerning his experience for the purpose of qualifying him as an expert witness as to the value of the services of the defendant in error, and was thereafter asked this question:

“Q. What in your judgment, Captain, is the reasonable value of Mr. Barnaby's services?

Mr. Gorham: We desire to ask the Captain a question or two before he answers that.

THE COURT: Very well.

CROSS-EXAMINATION.

By Mr. Gorham:

Q. You are the agent for the defendant corporation, in this suit at bar?

A. Yes.

Q. How long have you acted as such agent?

A. Three years.

Q. You are their resident agent at Seattle, in full charge of their business here?

A. Yes.

Q. Employ counsel to defend this suit?

A. Yes."

And thereupon the witness answered the question as an expert and counsel for defendant in error offered no further cross-examination. We submit that the context of this witness' entire testimony, including his cross-examination, showed that the purpose and object of counsel for defendant in error was simply to show the interest of Captain Jolivet in the controversy with a view to more or less affecting the weight of his evidence. There was nothing whatever to direct the attention of counsel for plaintiff in error or of the court to any purpose to use this to vary or modify the allegations of the complaint. Had there been it would have promptly been objected to.

It is perfectly patent from the testimony of the defendant in error just referred to and from the complaint and the entire theory of the cause in the lower court that the claim now made upon the testimony elicited upon the cross-examination of the witness Jolivet is the merest afterthought. The view taken by the court of this testimony clearly allowed the defendant in error to introduce testimony for one purpose, and later, when he finds his theory of the case not in accordance with the law, to seek to profit by this testimony as though it were in generally and to thereby contradict his solemn averment of jurisdictional facts. He, himself, has alleged and testified to a state of facts which started the statute of limitations running in April, 1912, when he demanded payment of this account. The record throughout shows that counsel for defendant in error tried his case in the court below upon the theory of the application of six years statute of limitations; his complaint is drafted upon that theory; and his stipulation, plaintiff's Exhibit 24, shows that. The opinion of the trial court shows that the case was tried upon the theory of the six years statute, and we most earnestly urge upon this court that this judgment should be reversed and the case dismissed for the reason that plaintiff in error made the point of the statute of limitations by its ob-

jection to the introduction of any testimony upon the ground and its objection should be disposed of upon the record as it then stood. This court says in its opinion that upon a demurrer the complaint would be construed against the pleader. What else is our objection to the introduction of evidence but a demurrer *ore tenus*, and we certainly are entitled to have it ruled upon as such and not ruled upon as a demurrer to the evidence, as has been done.

An objection to the admission of evidence is equivalent to a demurrer *ore tenus*.

Belknap Glass Co., Appellant, vs. Kelleher et al, 72 Wash 529.

Hindle vs. Holcomb, 34 Wash. 336.
(See bottom page 339)

Rothe vs. Rothe, 31 Wis. 570.

The opening statement of counsel is proper for the consideration of the Court in passing upon the objection to the introduction of evidence.

Oscanyan vs. Arms Co., 103 U. S. 261.

The court should consider this case and compel the defendant to try this case upon appeal upon the same theory upon which he tried it in the court below, namely, that the contract sued upon was a contract in writing and therefore within the six years statute of limi-

tations, and his solemn averment that for a period of more than three years prior to bringing the action the plaintiff in error was represented by an agent within the jurisdiction so as to be capable of being sued. If his theory as to the character of his contract is wrong he should be held to the consequences and he should not be permitted to escape by now contending in opposition to the solemn averment of his complaint, and admitted by the answer.

U. S. vs. Kettenbach, 208 Fed. 209.

Elliott on Appellate Procedure, Secs. 489, 490, 491 and 492.

Webb vs. Rosemond, 90 S. E. 306.

Belcher vs. Young, 90 Wash. 303.

Wichers vs. Wichers, 70 Southern 40.

Delano vs. Roberts, 182 S. W. 771.

The Court in its opinion undoubtedly overlooked one of the provisions of the statute of the State of Washington respecting the running of the statute of limitations. Actions may be begun in two ways in the State of Washington, namely, by the service of summons or the filing of a complaint.

“Actions in the several Superior Courts of this State shall be commenced by the service of a summons, as hereinafter provided, or by filing a complaint with the county clerk as the clerk of the Court”

Rem. & Bal. Code, Sec. 220.

It is further provided by Section 167, Rem. & Bal. Code,

“The limitations prescribed in this act (Chapter) shall apply to actions . . . an action shall be deemed commenced when the complaint is filed.”

In *Blalock vs. Condon*, 51 Wash. 604, *Service vs. MacMahon*, 42 Wash. 452, and in numerous other cases the Supreme Court of the State of Washington has held that service of summons without the filing of the complaint will not toll the statute. According to the allegations of the complaint of the defendant in error and according to his own testimony the defendant in error could at any time within three years after April, 1912, not only have filed his complaint, but he could have obtained service. It, however, appears that the obtaining of service without filing the complaint would not have tolled the statute. If service were necessary under our statute to start the action and toll the statute the point made by the defendant in error in this court but not in the court below might be worthy of serious consideration, but in the face of the statutory provision of the State of Washington that for the purposes of the statute of limitations an action shall be deemed begun when the complaint is filed, it must become evident that the issue of service of summons is

irrelevant. We presume, therefore, that this court has overlooked the statutory provision or had added to the exceptions provided in the statute, something which we respectfully suggest is beyond the power of this or any other court.

II.

The court, at page 6 of the opinion, says that the plaintiff in error made no request for a general finding. We submit that the court overlooked the state of the record. At page 65 of the record this occurs: "And Mr. Kiefer on behalf of the defendant contends that his objection to the introduction of any evidence in support of the complaint must be sustained and the evidence stricken, and further that in any event under all the evidence in the case the defendant was entitled to a judgment." The opinion of the trial court clearly shows that the court treats what occurred as a request from counsel for both parties to find generally for their respective clients. While the language here is somewhat informal, it clearly indicated to the trial court that both parties were requesting general findings in their favor.

We respectfully submit that the foregoing language is a sufficient challenge to the evidence and cer-

tainly ought to be given force and effect as a request for a general finding in favor of the plaintiff in error.

National Surety Co. vs. U. S., 200 Fed. 142.

Bunday vs. Huntington, 224 Fed. 847.

Paul vs. Del. L. & W. R. Co., 130 Fed. 951.

That being so, the inquiry arises as to whether or not there was any competent evidence to support the court's finding in favor of the plaintiff, and this brings us to a discussion of the question of the admissibility of the evidence of the witness Barnaby. This matter is disposed of by this court on pages 9 and 10 of the opinion and is embraced in the 11th to 18th assignments of error.

It appears to counsel that the court has unwittingly overlooked the exact state of the record, particularly the stipulation hereafter referred to. In the action in the Superior Court the plaintiff in his complaint, defendant's Exhibit "A," sets up that between November 12, 1909, and January 5th, 1914, he rendered services to plaintiff in error as a "ship's broker." Originally the complaint in the cause at bar alleged services rendered as "ship's broker" between October 29th, 1910, and June 6th, 1912. The court will observe that the dates of the period set up in the first action included all of the period set up in the cause at

bar for identical services, namely, "ship's broker." The court will also note that before the amendment in the cause at bar erasing the words "ship's broker" and inserting "ship's agent," it was stipulated between counsel that this amendment should not prejudice defendant's plea of former recovery (Record 23). Again it was stipulated before defendant rested that the amendment of the complaint in the cause at bar should not alter the force and effect of the judgment of the Superior Court as a bar, if otherwise a bar and that for that purpose the term "ship's agent" should be considered by the court to mean the same as "ship's broker" (Record 56).

Certainly the effect of this stipulation is to abrogate the trial amendment so far as it affects the right of the plaintiff in error to urge the plea of former recovery, and the case at bar is one brought for the *same kind of services* rendered during a portion of the period covered by the former recovery. No testimony could possibly be received to show otherwise in the face of such an admission in the pleadings in the case at bar and the record in the first suit.

When the testimony covered by our 11th to 18th assignments of error inclusive was offered there was before the court the record of the judgment in the Superior Court showing that the defendant in error had

recovered for all his services as "ship's broker" during a period embracing all of the period sued for in the case at bar for the *same kind of services*. We submit that this record was absolutely conclusive upon the defendant in error. The trial court and this court both appeared to think that he sued in one case for services as a "ship's agent" and in the other for services as "ship's broker," overlooking the stipulation we have above referred to, the effect of which stipulation as to make both actions for exactly the same services and both of them upon a *quantum meruit*. This state of the record surely makes all of the testimony covered by these assignments of error incompetent. The defendant in error was bound by his own records as he made them and his solemn stipulation at the bar of the court upon trial. We submit that by his pleadings in the two cases the defendant in error has absolutely shut out the testimony embraced in these assignments and which it is admitted that the lower court received over our objection and exception. Surely this court must have overlooked the two stipulations to which we have called attention. If these two stipulations upon the trial are to be given any force and effect it must be that we have here at bar a suit for services as "ship's broker" alleged to have been rendered during a period for which recovery for same service had already been

had in the first action. If this is true then our objection to the admission of the testimony must be sustained, and our assignments 11 to 18 are well taken. We refer to the authorities in our brief.

III.

At page 10 of the opinion the court concedes that the 9th and 10th assignments are well taken in the sense that the evidence was not admissible, and goes on to say that it was obviously harmless. We respectfully question the logic of this statement. It is unnecessary to cite authorities to this court to the effect that the findings of fact of a Federal trial court, sitting without a jury, have all the force and effect of a verdict of a jury. Neither is it necessary to cite authorities to the effect that if testimony is improperly admitted and permitted to go to a jury the verdict must be set aside and a new trial granted. There may be good reason for saying that testimony may be admitted for what it is worth before a jury, but it is hard to conceive of more damaging testimony than that which forms the basis of these two assignments.

A very vital question before the court was the amount of plaintiff's recovery. The testimony on behalf of the defendant in error showed \$5,000.00 and upwards.

That on behalf of the plaintiff in error placed the value of the services around \$500.00. The evidence objected to under these two assignments consists, first, of the bill which the plaintiff Barnaby stated was the amount paid by plaintiff in error to its representative in London, England, in the litigation over the Raithwaite Collision. This was followed up by the evidence of the witness Currie comparing the value of such services in England with the value of such services here. If this bill for 400 pounds Sterling, or substantially \$2,000.00 in our money, is doubled, as was done by the witness Currie at page 51 of the record over our objection and exception, we have just about the amount of recovery allowed the defendant in error. It is a singular coincidence if the trial court was not influenced by this testimony in making up his finding of the amount. It is certainly illogical to say that the admission of improper testimony vitiates the verdict of the jury but does not vitiate the finding of the trial court sitting without a jury and give to the finding of the trial court all the conclusive effect of a verdict. A trial court might well permit testimony which he considers of little weight to go to a jury or he may admit testimony and tell them to disregard it. It is utterly illogical, however, to say that a trial court sitting without a jury may admit testimony going to one of the

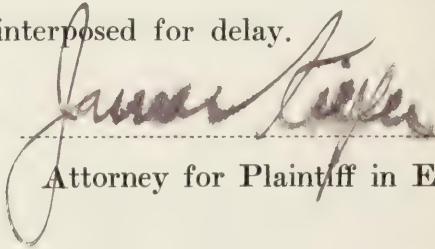
vital issues and hold that this does not vitiate his finding, to hold that he disregarded it.

Surely the trial court was not perpetrating a joke when he admitted this evidence; he was expecting to consider it and did consider it, and we have not the least doubt that he gave it substantial weight and that it entered materially into the making up of his finding of the amount.

For the reasons that we have herein pointed out, we respectfully request that a rehearing and reargument of this case should be granted.

JAMES KIEFER,
Attorney for Plaintiff in Error.

I James Kiefer, attorney for plaintiff in error, do hereby certify that the foregoing petition for rehearing is in my judgment well founded in law and that the same is not interposed for delay.

A handwritten signature in dark ink, appearing to read "James Kiefer", is written over a horizontal dashed line. The signature is fluid and cursive, with the first name "James" being more prominent than the last name "Kiefer".

Attorney for Plaintiff in Error.

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In the United States Circuit Court of Appeals

For the Ninth Circuit

SOCIETE NOUVELLE D'ARMEMENT,
Plaintiff in Error,
vs.

J. R. BARNABY, Defendant in Error.

*Upon Writ of Error to the United States District
Court for the Western District of Washington,
Northern Division.*

REPLY BRIEF OF PLAINTIFF IN ERROR.

JAMES KIEFER,

Attorney for Plaintiff in Error
Suite 327 Colman Bldg.,
Seattle, Wash.

Filed

MAY 15 1917

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REPLY BRIEF OF PLAINTIFF IN ERROR.

I.

The first point made by the defendant in error is not well taken.

Counsel has examined the record in the cases in this circuit cited in the brief of the defendant in error upon this point and finds that in not one of them was there any suggestion or hint or a request for a finding on behalf of the plaintiff in error. At page 65 of the record in this case we find a plain challenge to the

evidence. While a formal motion was not made, we submit that the record plainly shows that the point was made that under all the evidence in the case defendant (plaintiff in error) was entitled to a judgment. This we submit is sufficient under all the cases cited by the defendant in error in his brief. No formal or set language is required to constitute a challenge to the evidence. It is sufficient if the plaintiff in error called to the attention of the trial court the point that the evidence is insufficient to justify recovery by his adversary. The holdings in all the cases amount to this, that there must be a request for a finding for the plaintiff in error. The findings of a trial court are mixed findings of law and fact, and we respectfully contend that if the plaintiff in error makes the point in the trial court that he is entitled to judgment, the appellate court must review the sufficiency of the evidence to sustain the recovery. We submit that the language found on page 65 of the record in this case, "that in any event under all the evidence in the case the defendant was entitled to judgment" satisfies this requirement.

Bunday vs. Huntington, 224 Fed. 47.

A reading of the opinion of the trial court cannot fail to convince this court that the trial court treated this request of the defendant (plaintiff in error) as a

challenge to the evidence, and disposed of the case upon that theory. In recent years the courts have departed from the ancient rule that form is everything. It is not necessary that there should be a formal challenge in any set words.

II.

If we understand the counsel for defendant in error, his position is this, that because plaintiff in error failed to secure an immediate ruling by the court upon its objection to the introduction of any testimony to support the complaint (Tr. p. 24) there can now be no review of this matter. We have always understood that an exception imported a ruling. It is in the very nature and essence of an exception that there be a ruling of the court. How can counsel except to non-action? It is to the affirmative action of the court that exception is saved. So long as the ruling upon this objection remained in the breast of the court, we could not except to it, nor could we incorporate in the bill of exceptions any exception to the ruling because it was not made at the trial. We did except at the very earliest opportunity, namely, when the general finding was made. There never was any ruling on this objection except as it inheres in the general finding, and to this it is conceded we did properly except. We respectfully submit that the action of the court sub-

sequent to the closing of the trial is not a part of the bill of exceptions.

3 Cyc, 28.

2 Cyc, 1068.

Wesson vs. Saline County, 73 Fed. 917.

Actna Insurance Co. vs. Boon, 95 U. S. 117,
24 L. ed. 395.

III.

Counsel is entirely in error in his comment upon the ruling of the Supreme Court of the State of Washington in the case of *Schubach vs. Redelsheimer's Executors*. The court held directly the opposite of what Counsel stated on page 18 of the brief of the defendant in error. The court held that the executor of a non-intervention will need not present his claim to the court for allowance; that the court was without jurisdiction to pass upon it, and that it was the duty of a co-executor to pass upon it; and the court did sanction and sustain a suit brought by the assignee of an executor against both executors upon a claim rejected by a co-executor.

IV.

We submit that our 9th and 10th assignments of error should be sustained. In the brief of the defendant in error it is virtually admitted that the court erred in admitting this evidence over the objection and exception of the plaintiff in error and begs the question by

assuming that it was not prejudicial. In view of the liberal award, clearly it is prejudicial. Counsel for the defendant in error very strenuously conceded throughout his brief that the finding of fact of the trial court in the case tried in a Federal court upon waiver of a jury has all the effect of a verdict of a jury. It logically follows that in all respects the trial court sitting without a jury must be deemed to be in law the jury. The erroneous admission of testimony before a jury, counsel concedes, is always erroneous; and we submit therefore, that it should be held by the court that the admission of this testimony was erroneous, and upon this ground, if upon no other, the judgment should be reversed.

It is an absurdity to say that the plaintiff in error was not prejudiced by the admission of this evidence. It is not to be presumed that the trial court admitted evidence with the deliberate intention of not considering it in making up his findings and award. It would border upon the ridiculous for a trial court, sitting without a jury, to admit evidence of this kind and disregard it in making up his findings. The attention of the trial court had been challenged by the objections and exceptions of the plaintiff in error, and most certainly he intended to consider this evidence when he admitted it, and he did consider it. It is not urged

and cannot be urged that there was any other evidence of the same facts.

V.

On page 33 of the brief of defendant in error the assertion is made that we saved no exception to the evidence of the witness Gorham. The court should bear in mind the manner in which the testimony of the witness Gorham was given. It will appear at page 63 of the record that no questions were asked of the witness. He made a statement without any questions being previously asked. As soon as it became evident that the witness was going to testify to the consultation with his client, and the advice given by him, objection was interposed to all of it. We could not object when no questions were asked, and it is plainly apparent from the state of the record that the objection went to all of the testimony of the witness. The trial court so understood and counsel for defendant in error so understood it, and we submit that owing to the manner in which the testimony was given, the objection should be held to go to all of the testimony of the witness.

VI.

Finally we contend that all the evidence which was offered by the defendant in error to show that the services herein sued for were not included in the suit in the Superior Court was improperly admitted over the objection and exception of the plaintiff in error,

and Counsel for defendant in error admits this in his brief. That is, he admits that it was admitted over the objection and exception of the plaintiff in error. This being so, we submit that we have shown in our brief that the stipulation appearing at pages 23 and 56 of the record to the effect that "ship's broker" and "ship's agent" should mean the same thing, makes this suit one for services as a ship's broker rendered within a period for which the defendant in error had already recovered a judgment. It appearing to the court that upon a contract of oral employment the defendant in error had rendered certain services as a "ship's broker" or "ship's agent" (it is immaterial which) during a period of years and had sued and recovered for these services, he could not show as against our plea of former recovery that in fact he sued for other and different services in the first action. He is absolutely bound by the record as he has made it, and we submit that all of this testimony must come out. With this testimony out the only evidence left in the case shows conclusively that the defendant in error had already recovered.

We reiterate our position as stated in the concluding page of our opening brief.

Respectfully submitted,

JAMES KIEFER,
Attorney for Plaintiff in Error.

